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In The
Supreme Court of the United States

October Term, 1982

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER,
SUSAN BUTLER,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE
NEW YORK STATE COURT OF APPEALS**

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Of Counsel.

QUESTIONS PRESENTED

1. Does New York State Penal Law §240.35-3, Loitering for the Purpose of Engaging in Deviate Sexual Intercourse, represent a valid exercise of the State's power to control public order?

2. Is New York State Penal Law §240.35-3 violative of any rights protected under the United States Constitution?

LIST OF PARTIES

THE PEOPLE OF THE STATE OF NEW YORK,
RICHARD J. ARCARA,
DISTRICT ATTORNEY OF ERIE COUNTY,

Petitioner

ROBERT UPLINGER,
SUSAN BUTLER,

Respondents

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OPINION BELOW

Respondent Uplinger was convicted on November 16, 1981 following a non-jury trial in the Buffalo City Court. Charges against Respondent Butler were dismissed in Buffalo City Court by order dated October 8, 1981.

Timely notices of appeal were filed in each case and, on May 3, 1982, in a Memorandum and Order, County Court Judge Joseph P. McCarthy found the statute, Penal Law §240.35-3, constitutional as to all defendants. (See Appendix B, 113 Misc.2d 876.) Leave to appeal to the New York State Court of Appeals was sought on behalf of Respondents Uplinger and Butler and was granted by Certificate of Hon. Matthew J. Jasen, Associate Judge of the Court of Appeals by order dated May 25, 1982.*

*A third defendant, Fredericka Sanders, was convicted in the Buffalo City Court of the same offense and appealed her conviction to the Erie County Court. After affirmance there, she declined to seek leave to appeal to the Court of Appeals and is not a party here.

By Memorandum dated February 23, 1983, the New York Court of Appeals reversed the order of County Court and dismissed the informations as to both respondents. (Order and Memorandum attached as (Appendices A & B). Memorandum at 58 NY2d 936.)

JURISDICTION OF THIS COURT

On February 23, 1983, the New York State Court of Appeals held New York Penal Law §240.35-3 to be repugnant to the Constitution of the United States, thereby reversing the judgment of the Erie County Court with respect to Respondents Uplinger and Butler. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEW YORK STATE PENAL LAW

§240.35 Loitering

A person is guilty of loitering when he:

* * *

3. Loiters or remains about a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature; . . .

* * *

Loitering is a violation.

§130.38 Consensual Sodomy

A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person.

Consensual sodomy is a class B misdemeanor.

STATEMENT OF THE CASE

PEOPLE V. UPLINGER

Respondent Robert Uplinger was arrested on August 7, 1981 for the offense of Loitering pursuant to New York State Penal Law §240.35-3.

Officer Steven Nicosia, assigned to the Bureau of Vice Investigation of the Buffalo Police Department was working undercover in the vicinity of 140 North Street in the City of Buffalo, New York. While in the area, characterized as a quiet residential neighborhood, Nicosia was approached by Uplinger, who engaged the officer in conversation. The group of individuals which had congregated on the steps of 140 North Street, including Nicosia and Uplinger, were ordered to disperse by other police officers. As Nicosia walked away, he was followed by Uplinger. When Nicosia indicated that he was afraid of the police and wanted to leave, Uplinger stated:

"Well if you drive me over to my place or go over to my place I'll blow you."

Uplinger was thereafter placed under arrest for a violation of Penal Law §240.35-3.

A portion of the hearing was devoted to facts regarding the character of the neighborhood where these acts were alleged to have taken place. Residents had expressed apprehension about walking in the neighborhood, particularly past groups of homosexuals, and had been inconvenienced by the sounds of idling cars and indiscreet conversations. Pedestrians waiting for a bus have been propositioned for homosexual acts, as has a city councilman while waiting in his car.

After a hearing and non-jury trial, Buffalo City Court Judge Timothy J. Drury denied respondent's motion to dismiss the accusatory instrument on the ground that the statute was unconstitutional and found respondent guilty as charged. Uplinger was sentenced to pay a fine of \$100.00.

PEOPLE V. BUTLER

Respondent Susan Butler was arrested on April 1, 1981 for the offense of Loitering pursuant to New York State Penal Law §240.35-3.

At the time of her arrest, respondent Butler, a known prostitute, was observed waving at passing cars by Officer Kenneth Burgstahler, assigned to the Bureau of Vice Investigation of the Buffalo Police Department. At one point she engaged in a conversation with the driver of an automobile and, after two or three minutes, entered the automobile. After the vehicle backed down a side street, the officer circled the block, located the car and observed Respondent committing an act of oral sodomy on the driver. Both participants were thereafter arrested for loitering to commit a deviate sexual act.

Respondent entered a plea of not guilty and a hearing was thereafter held with respect to her motion to dismiss the accusatory instrument on the ground that the statute was unconstitutional. By an undated memorandum and subsequent order dated October 8, 1981, Buffalo City Court Judge Timothy J. Drury granted respondent's motion and dismissed the charges.

THE APPEALS

Appeals from each of the determinations were properly taken to the County Court of Erie County. In a Memorandum and Order applicable to both cases dated May 3, 1982, Erie County Court Judge Joseph P. McCarthy affirmed the conviction of Respondent Uplinger and reversed the determination with respect to Respondent Butler, reinstating the charge. Leave to appeal to the Court of Appeals was granted. Respondents claimed on appeal that their right to due process and their freedoms of speech and association had been violated. While failing to articulate the precise basis for the constitutional violation, the New York Court of Appeals nonetheless found the statute to be unconstitutional. The Court did liken the statute in this case to one struck down in *People v. Onofre*, 51 NY2d 476, cert. den. 451 U.S. 987, where the issues had been the denials of the right to privacy and equal protection under the law.

REASONS FOR GRANTING CERTIORARI

**New York State Penal Law Section 240.35-3
represents a valid exercise of the state's
power to control public order.**

The decision of the New York State Court of Appeals upon which petitioner seeks review held the state's loitering statute to be unconstitutional, yet on unspecified grounds. The thrust of the decision appears to be founded upon an earlier decision in

People v. Onofre, 51 NY2d 476, cert. denied 451 U.S. 987, where the court had found New York's Consensual Sodomy statute, Penal Law §130.38 to be unconstitutional on grounds of equal protection and right to privacy. Finding no valid state interest in regulating one's private consensual sexual activities and no discernible reason for differentiating between married and unmarried couples, the Court of Appeals invalidated the consensual sodomy statute on the basis of overbreadth.¹

In the present case, the court found that since the loitering statute "must be viewed as a companion statute," the loitering statute must also fall. That legal reasoning not only fails to articulate the particular basis for the declaration of unconstitutionality, it ignores basic principles of constitutional law.

The statute, contrary to the conclusion of the New York Court of Appeals, does not seek solely to punish conduct anticipatory to consensual sodomy. Its focus is on public order and is, rather, in the nature of a harassment statute. Although the Court of Appeals concluded that the Legislature could have enacted a law which prohibited accosting another in an offensive manner, it is clear that the statute in question was enacted for just that purpose. As pointed out by the lone dissenter at the Court of Appeals, the Legislature made a determination that "the vast majority of people prefer to go about their everyday business without being stopped or solicited, especially when the solicitation involves offers to engage in the most intimate of activities." In essence, the Legislature concluded that in the control of public order, there

¹To the extent that the decision in the present case was predicated upon *People v. Onofre*, *supra*, and represents an improper extension of an unfounded decision, petitioner requests that in the event certiorari is granted with respect to the loitering statute, that review also be granted with respect to the consensual sodomy provision.

existed a right reserved to the public in general which would allow them to be free from verbal assaults involving proposed sexual activities. In its decision, the Court of Appeals has determined that the individual's right to privacy gives rise to a right to solicit and that the rights of the vast majority of the public must be subjugated to the whims of the few.

The rights now claimed by respondents are, however, not absolute and are subject to restraint under proper circumstances. Even the freedom of speech, the cornerstone of our civilization, has been found to be properly limited when countervailing rights of the public exist. This Court has recognized certain exceptions applicable to First Amendment guarantees. Not only has the Court found First Amendment protection to be lacking in speech calculated to provoke a fight, (*Chaplinsky v. New Hampshire*, 315 U.S. 568), obscenity (*Roth v. United States*, 354 U.S. 476), libel, (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323) and exploitation of children, (*New York v. Ferber*, ____ U.S. ____, 102 S.Ct. 3348); it has sustained the constitutionality of zoning ordinances which sought to differentiate based upon the content of communications which were entitled to First Amendment protection.

In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, this Court had the opportunity to evaluate certain zoning ordinances of Detroit, Michigan which provided that an adult theatre could not be located within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area. In acknowledging that "the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect," the Court clarified the First Amendment concerns in its decision:

"Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser,

magnitude than the interest in untrammelled political debate that inspired Voltaire's immortal comment.² Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theatres of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures. 427 U.S. at 70-71."

The present statute does not attempt to control private sexual activities, but merely seeks to prevent the public loitering for purposes of engaging in deviate sexual acts. It does not, therefore, run afoul of those decisions which prohibit a total suppression of First Amendment rights.

A further refinement of the First Amendment rights occurred in *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, where this Court ruled that action by the Federal Communications Commission based upon a radio broadcast of a comedian's monologue which was concededly not obscene, but nonetheless offensive, was countenanced under the First Amendment.

"If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content — or even to the fact that it satirized contemporary attitudes about four-letter words — First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when

²"I disapprove of what you say, but I will defend to the death your right to say it." 427 U.S. at 63.

he said: "Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S., at 573," 437 U.S. at 746. (Footnotes omitted.)

Although partially based upon the broadcast medium involved, and recognizing that the alternative of turning off the radio did exist, the Court nonetheless found that material deemed "offensive," as opposed to "obscene," could be barred. In discounting the alternative suggested, the Court noted "that one may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place." 438 U.S. at 749.³

If it is true that we are often captives outside the sanctuary of our homes and subject to speech which would be deemed objectionable, *Cohen v. California*, 403 U.S. 15, the limits of protected speech are exceeded by propositions from sexual purveyors, whether prostitute or friendly homosexual. At issue in *Cohen* was the defendant's jacket, bearing the words "Fuck the Draft." Partially in view of the strongly political overtones of the message, this Court found such to be protected. Similarly, in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, this Court found that an ordinance prohibiting the exhibition of any motion picture, visible from the street, containing mere nudity of buttocks, breasts or pubic areas was unconstitutional. Due in part to the protected nature of the speech involved, the Court concluded that passing members of the public could avert their eyes.

³Consider the content of such an obscene telephone call and the content of a solicitation occurring while on a casual walk down a residential street. While the former is deemed criminal (New York State Penal Law §240.30) when the recipient experiences no present danger and has the opportunity to hang up, the New York Court of Appeals determined that the event occurring in person and, presumably, offering greater affront to the individual, is clothed in constitutional protections.

In the present case, however, the conduct involved was not limited to non-obscene displays or political commentary; it was conduct directly related to soliciting a sexual partner. If we acknowledge that a right of privacy exists which necessarily includes the right of an individual to engage in whatever sexual practices he desires in the confines of his own home, then there must exist a concomitant right to the individual on the street to be free from affronts to his own right to privacy. Such was recognized by the dissent at the Court of Appeals as a legitimate state purpose to be served in proscribing loitering for the purpose of soliciting deviate sexual activities.

Although the mere existence of other state statutes which proscribe the same or similar conduct will not make valid an unconstitutional enactment, it is indicative of a collective legislative intent to regulate offensive overtures to unwilling participants. Some nineteen states have laws similar to New York's which prohibit either loitering for solicitation or solicitation directly.⁴ Five additional states have laws which prohibit sodomy or consensual sodomy and corresponding provisions which prohibit the solicitation to commit a crime.⁵

Challenges to these statutes have come from a variety of perspectives with varying degrees of success. In *State v. Tusek*, 52 Or. App. 997, a successful challenge to an Oregon statute

⁴Alabama: Crim. Code §13A-11-7(a)(3); Arizona: Crim. Code §13-2904; Arkansas: Ark. Stat. Ann. 41-2914; California: Pen. C.A. §647; Colorado: Col. Crim. Code §18-9-112; Delaware: Del. C. §11-1321; Georgia: Ga. Code Ann. 26-2003; Kansas: K.S.A. 21-4108; Maryland: Ann. Code Art. 27 §15; Massachusetts: ALM GL c.272 §53; Michigan: MSA §28.570; Nevada: NRS §207.030; New Jersey: N.J.S.A. 2A:170-5; North Carolina: G.S. 14-204; Ohio: R.C. 2907.07; Oklahoma: 21 O.S. §1029; Oregon: O.R.S. 163-455; Rhode Island: G.L. 11-10-1; Wisconsin: WSA 947-02.

⁵Montana: MCA 45-4-101, MCA 45-5-505; South Carolina: Code 16-1-40, Code 16-15-120; Tennessee: T.C.A. 39-1-401, T.C.A. 39-2-612; Utah: U.C.A. 76-2-202, U.C.A. 76-5-403; Virginia: Code of Va. 18.2-29, Code of Va. 18.2-361.

similar to New York's came under the guise of a violation of free speech under the First Amendment. In *People v. Gibson*, 521 P.2d 774, a corresponding Colorado statute met a similar fate, but on Fourteenth Amendment Due Process grounds that the loitering had not been coupled with any other overt conduct. Massachusetts and California each sustained the constitutionality of similar statutes, but by imposing a judicial construction which more explicitly defined the conduct prohibited and by limiting the conduct to public places. *Pryor v. Los Angeles Municipal Court*, 25 Cal. 2d 238, 599 P.2d 636; *Commonwealth v. Sefranka*, ____ Mass. ____, 414 N.E.2d 602.

The type of statute under consideration is not unique to New York, nor is the tenor of the attacks upon these statutes. In spite of the existence of a valid state purpose in controlling invasions to the right of privacy of every citizen, state courts have utilized their considerable powers to declare statutes unconstitutional without proper reference to the principles underlying that power or the competing rights to be protected. In view of the continuing litigation in this area, the differing results achieved and the grounds therefore, review by the Supreme Court at this time would serve not only to provide the vehicle for a proper determination in the instant case, but would provide the opportunity to lend guidance to other courts which will undoubtedly face challenges to their statutes regulating similar conduct.

**New York State Penal Law §240.35-3
in neither its enactment nor its
enforcement violates constitutional
standards**

While not specifically forming the basis for the holding of the Court of Appeals, respondents had there asserted a number of other constitutional rights in order to bring about a determination that the statute was unconstitutional. In view of the lack of clarity in the memorandum decision of the Court of Appeals, it is prudent to review the other challenges in order to establish that no other constitutional infirmity exists in the statute.

A

***DUE PROCESS
VOID FOR VAGUENESS***

Respondents contended that the statute, which proscribes loitering for the purpose of "deviate sexual intercourse or other sexual behavior of a deviate nature," is unconstitutional due to the inherent vagueness of the above phrase. Although conceding that "deviate sexual intercourse" is appropriately defined in Penal Law §130.00-2, they nonetheless claimed that the remainder of the phrase, "other sexual behavior of a deviate nature" is not susceptible of adequate definition.

The definitional statute, proscribing "sexual conduct between the persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis or the mouth and the vulva," Penal Law §130.00-2, is sufficiently definitive to limit the scope of "other sexual behavior of a deviate nature." Under principles of *ejusdem generis*, the scope of the phrase is measured by the terms surrounding it.

“‘Where words of specific or inevitable purport are followed by words of general import the application of the last phrase is generally confined to the subject matter disclosed in the phrases with which it is connected; for it is known by the company it keeps; and though it might be capable of a wider significance if found alone, it is limited in its effect by the words to which it is an adjunct. It may strengthen the general structure, but it cannot exceed the original outline.’ (McKinney’s Cons. Laws of N.Y., Book 1, Statutes [1942 ed.], §239, citing *People v. Richards*, 108 N.Y. 137, *People v. Lamphere*, 219 App. Div. 422, and numerous other cases.)” *People v. Bell*, 306 NY 110, 115 (1953).

All that is constitutionally required is that the statute “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned v. City of Rockford*, 408 U.S. 104, 108. In the present case, both respondents had either engaged, or offered to engage, in conduct which involved contact between mouth and penis, conduct clearly embraced by the terms of the statute. Absent is any appreciable degree of uncertainty which would place an unwarranted amount of discretion in the hands of the police, judges or juries. *Papachristou v. City of Jacksonville*, 405 U.S. 156. Since other less offensive forms of sexual contact as opposed to sexual intercourse are defined in another section,⁶ they are removed from consideration of what might be considered deviate sexual intercourse.

Since the statute is sufficiently clear on its face as to the conduct proscribed, and does not place an impermissible level of discretion in the hands of the police, it is not unconstitutionally vague.

⁶Penal Law §130.00-3 defines “sexual contact” as “any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party.”

B

FREEDOM OF SPEECH

Respondents raised a variety of First Amendment claims couched generally in terms of the free speech aspects of the verbal act of soliciting another individual to commit a deviate sexual act. While they contended that the statute in question punishes the exercise of those rights, in fact, the statute's primary focus is on the act of loitering; the speech which appellant claims is protected is merely evidence of the intent of the defendant.

Far back in this Court's protection of First Amendment rights it became evident that not all forms of speech and press were protected and that speech integral to the commission of a crime deserved no protection. In *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, this Court held as follows:

"... it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." 336 U.S. at 502.

More recently, in *Healy v. James*, 408 U.S. 169, the Court continued the distinction.

"... the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not." 408 U.S. at 192.

What has also evolved is a differing set of standards delineating the degree of protection to which any particular form of expression is entitled. While at one time it might have been said that speech was either entitled to protection under the First Amendment or not, depending on whether it exceeded the bounds set for certain types of speech (e.g. obscenity — *Roth v. United States*, 354 U.S. 476; fighting words — *Chaplinsky v.*

New Hampshire, 315 U.S. 568; criminal activity — *Brandenburg v. Ohio*, 395 U.S. 444), that black/white dichotomy has expanded into a spectrum of grays between those polar extremes.

While the Court at one time suggested only that an unwilling viewer of non-obscene, yet offensive, material avert his eye (*Cohen v. California*, 403 U.S. 15; *Erznoznik v. City of Jacksonville*, 442 U.S. 205), the Court has more recently chosen to differentiate, based upon the content and type of the communication, as to the *degree* of protection to be afforded (*F.C.C. v. Pacifica Foundation*, 438 U.S. 726; *California v. LaRue*, 405 U.S. 109).

In *LaRue, supra*, the Court upheld California liquor authority regulations prohibiting explicitly sexual live entertainment and films at bars licensed by the state. In doing so, the Court noted as follows:

“The substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, “performances” that partake more of gross sexuality than of communication.

* * *

This is not to say that all such conduct and performance are without the protection of the First and Fourteenth Amendments. But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theatre.” 409 U.S. at 118.

In *Doran v. Salem Inn, Inc.*, 422 U.S. 922, the Court reaffirmed its earlier holding and concluded that “the customary ‘barroom’ type of nude dancing may involve only the barest minimum of protected expression.” 422 U.S. at 932.

If there exists a differing degree of protection between a scantily clad ballet troupe and a sexually provocative nude dancer in a bar, then an equally differing degree of protection exists between an intellectual discussion on the sexual practices of homosexuals and the banal offer of "if you drive me over to my place . . . I'll blow you".

The speech which respondents sought to have brought under the umbrella of the First Amendment is clearly not of the character deserving of such protection.

C

FREEDOM OF ASSOCIATION

Also challenged was the statute's inhibition of the free exercise of an individual's rights to associate with whom he chooses. As previously noted, the statute prohibits loitering, rather than any associational conduct. While respondents may view the inability to loiter as "chilling" the exercise of their rights, neither the statute, nor its enforcement is designed to inhibit such free exercise.

Not only does the character of the conduct deny the existence of constitutional protections, the protections which respondents seek to invoke are not absolute.

In *Cox v. Louisiana*, 379 U.S. 536, this Court explained the scope of the right of assembly.

"The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this

necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuse of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection." 379 U.S. at 554.

This statement was reaffirmed in *Adderley v. Florida*, 385 U.S. 39, where the Court rejected the argument that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." 385 U.S. at 48. What appellants see as protected assembly is not a speaker or a rally or a demonstration in favor of gay rights, but a "stag line" of homosexuals offering or imposing themselves on passers-by while loitering on the street.

The teaching of *Healy v. James*, 408 U.S. 169, is not to the contrary. There, official recognition of an organization had been denied by a college, thereby denying the organization the use of facilities. Although ruling that the organization was entitled to recognition and the corollary freedom to associate, the court nonetheless concluded as follows:

"... the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not. Petitioners may, if they so choose, preach the propriety of amending or even doing away with any or all campus regulations. They may not, however, undertake to flout these rules." 408 U.S. at 192.

The conduct of respondents, whether allegedly unobtrusive homosexual conduct on North Street or blatant prostitution activities on Genesee Street, is not protected by First Amendment guarantees. To attempt to justify constitutional protection under these circumstances is to strain the First Amendment beyond the limits of proper construction.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the within petition.

Respectfully submitted,

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APPENDICES

APPENDIX A
REMITTITUR OF THE NEW YORK STATE
COURT OF APPEALS

Remittitur

COURT OF APPEALS — STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

CoC	No.	7	
The People &c.,			<i>Respondent,</i>
		v.	
Robert Uplinger,			<i>Appellant.</i>
The People &c.,			<i>Respondent,</i>
		v.	
Susan Butler,			<i>Appellant.</i>

The appellant(s) in the above entitled appeal appeared by Rose H. Sconiers, The Legal Aid Bureau of Buffalo, Inc.; Hodgson, Russ, Andrews, Woods & Goodyear, Esqs., the respondent(s) appeared by Hon. Richard J. Arcara, District Attorney, Erie County.

The Court, after due deliberation, orders and adjudges that the order is reversed and the informations dismissed in a memorandum. Chief Judge Cooke and Judges Jones, Wachtler, Fuchsberg, Meyer and Simons concur. Judge Jasen dissents and votes to affirm in an opinion.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Buffalo City Court, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

[SEAL]

JOSEPH W. BELLACOSA,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, February 23, 1983.

APPENDIX B
MEMORANDUM OF THE NEW YORK
COURT OF APPEALS DATED FEBRUARY 23, 1983
STATE OF NEW YORK — COURT OF APPEALS

CoC	No.	7	
The People &C.,			<i>Respondent,</i>
		v.	
Robert Uplinger,			<i>Appellant,</i>
The People &c.,			<i>Respondent,</i>
		v.	
Susan Butler,			<i>Appellant.</i>

(7) William H. Gardner, Buffalo, for appellant Uplinger.
Joseph A. Shifflett, Rose H. Sconiers, & Joseph B. Mistrett,
Buffalo Legal Aid, for appellant Butler.

Richard J. Arcara, DA, Erie County (John J. DeFranks &
Louis A. Haremski of counsel) for respondent.

Michael J. Lavery, NYC, for Lambda Legal Defense Fund;
Sarah Wunsch & Rhonda Copelon, NYC, for Center for
Constitutional Rights; Steven R. Shapiro, NYC, for NY Civil
Liberties Union, amici curiae.

MEMORANDUM

The order of the County Court should be reversed and in
each case the information should be dismissed.

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Memorandum of the New York Court of Appeals
Dated February 23, 1983

The statute challenged on these appeals (Penal Law, §240.35, subd 3), which prohibits loitering "in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature" must be viewed as a companion statute to the consensual sodomy statute (Penal Law, §130.38) which criminalized acts of deviate sexual intercourse between consenting adults. We held in *People v Onofre* (51 NY2d 476) that the State may not constitutionally prohibit sexual behavior conducted in private between consenting adults. The object of the loitering statute is to punish conduct anticipatory to the act of consensual sodomy. Inasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose. This statute, therefore, suffers the same deficiencies as did the consensual sodomy statute. Because the statute itself is devoid of a requirement that the conduct proscribed be in any way offensive or annoying to others, the challenged statute cannot be categorized as a harassment statute.

The dissent improperly reads into this holding a blanket proscription upon all statutes directed against conduct of this nature. We do not hold that the Legislature cannot enact a law prohibiting a person from accosting another in an offensive manner or in an inappropriate place even if the underlying purpose is not a violation of law. The Legislature could also prohibit solicitation for the purpose of performing the object conduct in a public place. On the contrary, statutes of this general nature when properly drafted have been upheld by the courts. However, it is apparent from the wording of this statute that it was aimed at proscribing overtures, not necessarily

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bothersome to the recipient, leading to what was, at the time the law was enacted, an illegal act.

The dissenter's perception of the basis for conclusion of unconstitutionality is inaccurate and confuses the defendants' argument with our holding; we have neither discussed nor decided any overbreadth questions by implication or otherwise.

People v Uplinger
People v Butler

JASEN, J. (dissenting):

The majority today invalidates a provision of the Penal Law¹ designed to protect persons from being harassed on the public streets by others who seek only their own sexual gratification. Without addressing the arguments made by either the defendants or the People, they do so on the ground that this statute is nothing more than a companion statute to the consensual sodomy statute and since we have determined that the Legislature cannot proscribe sexual conduct between consenting adults in private, it cannot proscribe any conduct anticipatory to consensual sodomy. In my view, this court's decision in *People v Onofre* (51 NY2d 476) in no way limited the Legislature's ability to regulate public conduct, albeit anticipatory to later private conduct. As it seems to me that the statute represents a valid legislative effort to protect the public against unwarranted harassment, I am compelled to dissent.

¹Section 240.35 of the Penal Law provides, in pertinent part, that "[a] person is guilty of loitering when he: * * * 3. Loiters or remains in a public place for the purpose of * * * soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature".

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The history of this statute does not support the majority's contention that it "must be viewed as a companion statute to the consensual sodomy statute". Section 240.35 of the Penal Law, denominated "Loitering" and codified with other crimes concerning public order, was derived from former sections 722 and 1148 of the Penal Law. Those proscribed loitering "about any public place soliciting men for the purpose of committing a crime against nature^[2] or other lewdness" or soliciting for immoral purposes.³ The former being more closely related to the statute now before us, it too was not codified under crimes of a sexual nature, but under that part of the Penal Law denominated "Disorderly conduct". Thus, there is no indication that the Legislature was in any way addressing itself to private conduct; rather, every indication is that this statute was designed to regulate public conduct which would be considered offensive.

Whether or not the conduct which the loitering was in anticipation of is deemed criminal, it is clear that the State retains a very valid reason for proscribing loitering to solicit. Indeed, in recommending an almost identical statute, the drafters of the Model Penal Code recognized the continuing validity of this type of statute despite the adoption of the Reporters' recommendation to decriminalize consensual sodomy.

"The rationale for retaining this offense is not the regulation of private morality but the suppression of public nuisance. Persons who publicly seek or make

[2] Crimes against nature were defined in former section 690 of the Penal Law and incorporated all acts of sodomy, consensual or otherwise.

³ The later section was clearly aimed at pimping activities as it also made it a crime to live wholly or in part on the earnings of a prostitute.

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themselves available for deviate sexual relations openly flout community standards. Moreover, indiscriminate solicitation in public streets, parks, and transportation facilities is not only an affront to moral and aesthetic sensibilities; it is also a source of annoyance to, and harassment of, members of the public who do not wish to become involved. Section 251.3 is designed to protect the legitimate expectations of citizens in public places by proscribing this kind of annoying activity. For that reason the offense is not limited to loitering for hire, as is the case under Section 251.2 on prostitution." (Model Penal Code, § 251.3, Comment, at p. 476.)

In light of this background and its codification under "Public Order" in the Penal Law, I fail to perceive how the majority can conclude that the statute is not a harassment statute. There is no necessity that the statute require the conduct proscribed to be offensive or annoying to others. This statute embodies the Legislature's determination that public solicitation to engage in sexual conduct is necessarily offensive to others. While some may welcome such offers, there is nothing irrational in the Legislature's determination that the vast majority of people prefer to go about their everyday business without being stopped or solicited, especially when the solicitation involves offers to engage in the most intimate of activities.

Nor is it irrational for the Legislature to have decided that the presence of people soliciting in public to engage in sexual conduct is in and of itself annoying. In addition, such conduct can be annoying, offensive and even threatening to those who are not directly solicited but merely observe such conduct. It is not difficult to envision persons being annoyed and offended if the person they are walking with is solicited. Certainly such conduct is, at a minimum, an annoyance to those who reside in

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the immediate area who must witness the public solicitation of sexual partners. The Legislature's legitimate concerns with the interests of those people who desire only to live a quiet and private life mandates that it be allowed to determine when and where certain conduct is no longer protected but becomes harassment of others. Thus, I do not believe one can say, as does the majority, that "[t]he object of the loitering statute is to punish conduct anticipatory to the act of consensual sodomy." The statute just as clearly has as an object the regulation of conduct which becomes offensive because it occurs in public.

I am further troubled by the majority's reasoning because, although they do not state that they are invalidating the statute by application of the overbreadth doctrine, it seems to me that that rationale is implicit in their statement that (at p. 938) "[i]nasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose." To my mind, a conclusion that the statute is unconstitutional based on this reasoning indicates that loitering in anticipation of consensual sodomy is protected just as consensual sodomy is protected. I fail to perceive what basis there is to invalidate a statute on reasoning that it reaches protected activity except on the basis that by encompassing that protected activity it is overbroad. The very concept of the overbreadth doctrine is that a statute which encompasses protected activity as part of an effort to proscribe other conduct is constitutionally flawed because of its scope — in other words, because it is overbroad. (*Arnett v Kennedy* 416 US 134; Tribe, *American Constitutional Law*, § 12-26, pp 710-724.)

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The majority's reference to *People v Onofre* (51 NY2d 476, *supra*) also leads me to conclude that the majority is depending, at least in part, on the doctrine of overbreadth. They conclude: "This statute, therefore, suffers the same deficiencies as did the consensual sodomy statute." This court held section 130.38 of the Penal Law, which proscribed consensual sodomy to be unconstitutional "[b]ecause [it was] *broad* enough to reach noncommercial, cloistered personal sexual conduct of consenting adults". (*People v Onofre, supra*, at p 485.)

I cannot concur in the majority's analysis because I do not believe that this statute is overbroad and because I do not believe that the overbreadth doctrine should be applied in this case.

In deciding whether or not a statute is facially overbroad because it reaches protected as well as unprotected activity, the Supreme Court has set down certain guidelines. First, "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." (*Broadrick v Oklahoma*, 413 US 601, 610.) Thus, defendant Butler, who was flagging down cars while making loud and overt offers to sell sexual favors, cannot be heard to raise a claim that this statute is invalid because it might be used against someone else who is quietly standing on the street corner having the intent to make an indiscreet offer to a passerby.

As to defendant Uplinger, one must assume the majority accepted his argument that speech aimed at finding a sexual partner to engage in deviate sex is protected because the sexual conduct to be engaged in is no longer illegal. (*People v Onofre*, 51 NY2d 476, *supra*.) In doing so, the majority apparently

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applies the exception in the First Amendment area which allows a person to challenge a statute as having an overbroad and, hence, unconstitutional scope even though his own conduct might be proscribed by a narrow interpretation of the statute. The majority apparently overlooks the Supreme Court's admonition that the overbreadth doctrine should be "employed by the Court sparingly and only as a last resort" and should not be "invoked when a limiting construction has been or could be placed on the challenged statute." (*Broadrick v Oklahoma*, 413 US 601, 613, *supra*.) In this case, we would comport with the Supreme Court's mandate were we to interpret the statute as requiring a public act of solicitation to engage in deviate sex such as defendant Uplinger was arrested for. Although solicitation may be verbal in nature, it certainly involves conduct which is greater than speech alone.

Additionally, we should avoid invalidating a statute *in toto* on the ground that it is overbroad as applied to some conduct if it can be validated as to other conduct. As the Supreme Court stated: "[O]verbreadth claims, if entertained at all [should be] curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct." (*Broadrick v Oklahoma, supra*, at p 613.) Thus, in *Cantwell v Connecticut* (310 US 296), a conviction under Connecticut's breach of peace statute was set aside because the defendant's conduct was found to be protected by the First Amendment. This, however, did not require that the statute proscribing conduct which breached the peace be invalidated in all respects.

In this case then, even if the majority concluded that defendant Uplinger's conduct was protected by the First Amendment or that he could raise possible conflicts with the First Amendment, it would be unnecessary to invalidate the

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entire subdivision of section 240.35 of the Penal Law. Instead, it seems to me the proper remedy would be to apply a limited construction interpreting the statute to proscribe only acts which amount to public solicitation to engage in sexual conduct. That would be sufficient to validate the statute. Furthermore, such a construction would eliminate any fear that the broad wording of the statute would deter protected speech, particularly because such an interpretation addresses the statute to conduct as well as speech. As the Supreme Court noted in *Broadrick v Oklahoma*: "Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect — at best a prediction — cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." (*Supra*, at p 615.)

Because I do not believe that this statute when read to proscribe acts of solicitation in a public place must be invalidated under the overbreadth doctrine, it is necessary to address defendant's further contention that the statute must fall on vagueness grounds. In my view, the statute is not vague as to the specific conduct prohibited and, thus, does not allow arbitrary or discriminatory police enforcement. For a statute to be deemed unconstitutionally vague, it must be shown that it " 'fails to give a person of *ordinary intelligence fair notice* that his contemplated conduct is forbidden by the statute.' " (*Papachristou v City of Jacksonville*, 405 US 156, 162 [emphasis supplied], quoting *United States v Harriss*, 347 US 612, 617). All that is required is that the "statute must be sufficiently definite to give a *reasonable man* subject to it notice of the nature of what is prohibited and what is required of him." (*People v Pagnotta*, 25 NY2d 333, 337 [emphasis supplied],

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citing *People v Byron*, 17 NY2d 64, 67; *Lanzetta v New Jersey*, 306 US 451.)

Applying this well established rule to the statute before us, I believe the statute sufficiently informs a person of the criminal implications of loitering in a public place for the purpose of "soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature." (Penal Law, § 240.35, subd 3 [emphasis supplied].) The statute does not merely proscribe loitering, but points up the prohibited conduct — "soliciting another person to engage, in deviate sexual intercourse" — in language sufficiently definite to give a person of ordinary intelligence fair notice of the conduct forbidden. Thus, only those persons who solicit others in a public place and thereby create a public nuisance would be subject to arrest and prosecution under the statute. Since it is abundantly clear from the language of the statute that the Legislature intended to proscribe public acts of solicitation to engage in deviate sexual activities, such an interpretation of the statute is reasonable and the statute should be upheld just as we have upheld other statutes where the Legislature designated the conduct proscribed. (*People v Pagnotta*, 25 NY2d 333, *supra*; *People v Smith*, 44 NY2d 613.)

Thus, this statute should not fail on the reasoning of *Papachristou v City of Jacksonville* (405 US 156, *supra*) or *People v Berck* (32 NY2d 567, cert den 414 US 1093). Those cases addressed themselves to statutes which proscribed loitering under circumstances arousing suspicion (*People v Berck*, *supra*) and statutes which essentially allowed a person to be arrested because of conceivably innocent conduct (*Papachristou v City of Jacksonville*, *supra*). The latter was offensive because it was impossible for the ordinary person to

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know when he had transgressed the statute and thereby avoid doing so. In turn, this meant that the police had unbridled discretion as to when and against whom they would apply the statute. Similarly, in *People v Berck (supra)*, we found a statute proscribing loitering under suspicious circumstances unconstitutional because the ordinary person could not be expected to know when the circumstances were adequately suspicious to trigger an arrest. The essential flaw in those statutes was the excessive discretion given the police due to the subjective standard the statutes incorporated. Such a standard meant that criminality turned largely on how the arresting officer viewed a person's conduct. Such is not the case with this statute; rather, specific conduct — an act of solicitation occurring in a public place and involving an offer of sexual activity — is required before police action is warranted.

There is an additional question that must be addressed before it can properly be said that a statute is constitutional. When a statute "places some restriction upon an individual's freedom of action in the name of the police power [that law] must bear some reasonable relation to the public good." (*People v Pagnotta*, 25 NY2d 333, 337, *supra*, citing *People v Bunis*, 9 NY2d 1, 4.) For this reason, we have validated statutes which proscribe conduct in a school yard (*People v Johnson*, 6 NY2d 549), on the waterfront (*People v Merolla*, 9 NY2d 62), and in the hallways of public buildings when related to narcotics use (*People v Pagnotta*, 25 NY2d 333, *supra*) because there is a valid public interest involved in regulating conduct in those areas. So, too, is there a valid public interest in regulating conduct in public places when that conduct infringes on another person's right to privacy and to be free from harassment. Clearly, such conduct will and is directed not only at those making themselves available for such solicitation, but

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it is also directed to any person who happens down the street, regardless of how innocently that person happens to be there. Furthermore, such *conduct* can offend not only those who are solicited, but those who must, due to the necessity of being in the area, observe and overhear such conduct. In my view, it is within the power of the Legislature to regulate such conduct by proscribing solicitation related to sexual activity, even activity protected by an individual's right to privacy, when that solicitation occurs in a public place.

Accordingly, by interpreting the statute to proscribe only the overt act of solicitation in a public place, I believe the statute passes constitutional scrutiny under either the overbreadth doctrine or the vagueness doctrine. I do not, at this time, portend, as the majority suggests, to pass on the constitutionality of all statutes directed at "conduct of this nature", but merely speak to the statute before us. In so interpreting this statute, we fulfill our obligation to sustain the constitutionality of the statute if such construction can fairly be held to have been within the contemplation of the Legislature. Given the clear intent of the Legislature to address offensive public behavior, it cannot be said that such an interpretation would constitute judicial legislation.

Given this interpretation and perspective on the statute and its derivation, I cannot agree with the majority that it is only designed to proscribe conduct anticipatory to the act of consensual sodomy. No person should have the right to create a public nuisance or disturb others on the street so that he may later engage in private sexual conduct. The Legislature certainly is within its authority to regulate conduct in public and I believe they have done so in a constitutional manner in this case.

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Chief Judge Cooke and Judges Jones, Wachtler, Fuchsberg, Meyer and Simons concur in a memorandum; Judge Jasen dissents and votes to affirm in an opinion.

In each case: Order reversed, etc.

APPENDIX C
MEMORANDUM AND ORDER OF THE ERIE COUNTY
COURT DATED MAY 3, 1982

STATE OF NEW YORK
COUNTY COURT — ERIE COUNTY

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

ROBERT UPLINGER,

Appellant.

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

FREDERICKA SANDERS,

Appellant.

PEOPLE OF THE STATE OF NEW YORK,

Appellant,

vs.

SUSAN BUTLER,

Respondent.

RICHARD J. ARCARA, ESQ.
District Attorney of Erie County
By: ERNEST G. ANSTEY, ESQ.
Assistant District Attorney
Appearing for the Respondent.

WILLIAM H. GARDNER, ESQ.
1800 One M & T Plaza
Buffalo, New York 14203
*Attorney for Robert Uplinger and
Fredericka Sanders.*

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Memorandum and Order of the Erie County Court

Dated May 3, 1982

ROSE H. SCONIERS, ESQ.
JOSEPH A. SHIFFLETT, ESQ. and
MICHAEL C. WALSH, ESQ., *of counsel*
205 Convention Tower
Buffalo, New York 14202
Attorneys for Susan Butler.

MEMORANDUM AND ORDER

McCARTHY, J.

The defendants in these appeals contend that subdivision 3 of section 240.35 of the Penal Law which proscribes loitering in public for the purpose of soliciting another to engage in deviate sexual intercourse is violative of rights protected by our federal and state constitutions.

The statute in question provides as follows:

“§240.35 Loitering

A person is guilty of loitering when he:

...

3. Loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature”.

The facts in each case may be quickly summarized. The evidence offered against Robert Uplinger shows that he approached a male undercover Buffalo Police Officer in front of a residential hotel in the City of Buffalo at about 3:00 a.m. on August 7, 1981. He invited the officer to his apartment for the purpose of engaging in fellatio. Uplinger was found guilty of

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having violated the loitering statute and he concedes that his guilt under its text is clear.

Defendant Fredericka Sanders was also found guilty of the same offense after trial. She was observed by a police officer at about 12:40 a.m. on April 15, 1981, walking back and forth near a street corner glancing at cars. After approximately 10 minutes an automobile stopped, the defendant entered the vehicle and it drove away. It was then parked on a nearby street about two blocks away. The officer approached the car and, using his flashlight, observed the defendant performing a sodomous act with the male driver.

Defendant Susan Butler was also charged with having violated this loitering statute. She was observed standing near a street corner waving to passing motorists during the early morning of April 1, 1980. Within a few minutes a car stopped, the defendant spoke with the driver and entered the vehicle which was then parked nearby. The officer walked to the vehicle and witnessed the defendant engaging in oral sodomy. The charge against defendant Butler was dismissed upon a determination, following a hearing, that Penal Law §240.35 (subd [3]), as applied, is violative of the equal protection clause of the Fourteenth Amendment and is also unconstitutionally vague.¹

The People appeal from the order of dismissal in the Butler case, and the defendants Uplinger and Sanders appeal from their judgments of conviction.

¹Although the defendants Butler and Sanders may have been charged with other violations of the Penal Law based upon their observed conduct, the sole concern here relates to the validity of section 240.35 (subd [3]).

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Dated May 3, 1982*

In evaluating a challenge to a legislative enactment, it is fundamental that the infirmity of the statute must be demonstrated beyond a reasonable doubt (*People v Pagnotta*, 25 NY2d 333, 337). The contentions of the defendants, therefore, must be measured against this standard.

The defendants on these appeals urge that section 240.35 (subd[3]) is defective and unconstitutional on the ground that it prohibits lawful conduct; that it unreasonably restricts free speech; that it improperly punishes one's mental operation alone; that it violates the equal protection clause; that it is selectively enforced; and that it is void for vagueness.

Initially, relying upon *People v Onofre*, (51 NY2d 476), which held that our State's consensual sodomy statute (Penal Law §130.38) is unconstitutional, the defendants maintain that loitering for the purpose of soliciting others to engage in constitutionally protected activity may not be outlawed. The defendants observe correctly that a statute which prohibits loitering, without more, is not sustainable inasmuch as it fails to specify the prohibited conduct (see *People v Berck*, 32 NY2d 567). Coupling this factor with the *Onofre* determination, the defendants conclude that section 240.35 (subd[3]) cannot withstand attack because it prohibits sodomy in private between consenting adults which is no longer a crime in this State. This approach assumes that the object of the loitering must itself be criminal conduct. However, no such specific requirement is found in organic law, statutory enactment or decisional authority. The question here is not whether the prohibited act is criminal but whether its proscription is rationally related to the interests of public morality. The Court of Appeals has made clear in *Onofre* that concerns for public morality are legally cognizable and those concerns are now fully applicable.

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*Memorandum and Order of the Erie County Court**Dated May 3, 1982*

It is also contended that since sodomy performed by consenting adults in private is legal, there must in accord with the guarantees or free speech be permitted some limited communication whereby one can solicit another to engage in such conduct. In support of this position the defendants focus upon the manner of the solicitation. It is argued that a discreet, non-obtrusive invitation is permissible as opposed to one audible to other members of the public. Under this view the sensibilities of the public deserve protection; however, when an individual member of the public is singled out, his or her sensibilities become inconsequential. This line of reasoning underscores, in part, the purpose of this legislation. Such offenses are designed to suppress public nuisance not to regulate private morality. Indiscriminate public solicitation for deviate sex constitutes a contemptuous disregard for community standards, facially defies moral and aesthetic sensibilities, and annoys individuals who do not wish to become involved in such activities. Surely the reasonable and legitimate expectations of citizens in public places may be protected from this undesired annoying behavior. (Model Penal Code, §251.3, p 476). These factors expressly alluded to by the Court of Appeals in *Onofre* provide a valid and rational basis to interdict the conduct described in section 240.35 (subd [3]).

The defendants may not anchor their claims to the right of free speech guaranteed by the First Amendment. The statute simply impedes the solicitation of others for deviate sexual activity only by individuals loitering in public places. It does not punish speech alone. Obviously what we have a right to do or say in private, we do not always have a right to do or say in public. This statute does no more than reasonably and narrowly limit one's opportunity to solicit others to engage in deviate sex and it does so without trespassing upon the right of

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free speech. Any criminal statute may have an incidental effect on speech (*People v Smith*, 44 NY2d 613, 623). The view that this law constitutes a "total ban" on free speech is without merit and no support for this position may be drawn from *Bellanca v New York State Liquor Authority*, (54 NY2d 228). There the Court addressed a statute barring all topless dancing performances to willing customers under all circumstances. In sharp contrast, this statute does not bar all solicitations; nor, significantly, may it be concluded that the individuals solicited willingly subject themselves to such behavior. Surely, one's use of the public thoroughfare does not signify a receptivity to advances of this sort.

Next, the claim that section 240.35 (subd [3]) unconstitutionally proscribes loitering with the purpose of engaging in deviate sexual conduct but without requiring overt conduct on the part of an accused is also rejected. Although this statute embraces the lowest grade of offense within the Penal Law, the unyielding requirements of probable cause to arrest and of proof beyond a reasonable doubt to convict are nevertheless fully applicable and serve to protect completely one's entitlement to due process. This statute must — as the police officers in these cases have — be interpreted so as to require either an overt act or other conduct unambiguously evidencing the proscribed purpose.

With respect to the contention that this statute violates the right to equal protection, it is argued that the law is fatally underinclusive since it does not bar solicitation to engage in non-deviate sexual conduct. The statute does, however, treat all persons under similar circumstances alike and there is no requirement that a statute regulate every class to which it might be applied. Equal protection is not denied because a statute

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*Memorandum and Order of the Erie County Court
Dated May 3, 1982*

does not include other related activities within its reach. In addition, the historical and presently existing views shared by many in our society concerning deviate and non-deviate sexual conduct afford a rational basis for this legislative classification. The Legislature may have rationally concluded that solicitation by loiterers for deviate sexual activity is more offensive to the standards of public morality and, thus, more egregious than is the solicitation to participate in non-deviate sexual conduct. The reasonableness of this distinction is borne out by practical experience and common observation and these considerations prevent the destruction of the statute by the judiciary on the ground that it is arbitrary (cf *Town of Huntington v Park Shore Country Day Camp*, 47 NY2d 61, 66; *Dandridge v Williams*, 397 US 471, 485). Given the legitimate interest of the State in suppressing the activity proscribed by section 240.35 (subd [3]) and since the statute does not directly embrace a fundamental interest or a suspect classification, the equal protection clause is not offended.

Next, insofar as it is claimed that equal protection is violated on the ground that the statute is selectively enforced, there is no showing that it is knowingly and intentionally unenforced against those known to have committed this offense (see *Matter of Dora P.*, 68 AD2d 719, 733). Accordingly, this argument is also rejected.

Finally, it said that the statute is void for vagueness on the ground that the phrase "other sexual behavior of a deviate nature" fails to give adequate notice of the conduct declared to be criminal. This phrase, however, represents a permissible legislative technique to avoid the cataloguing of the multiple variations of deviate sexual behavior. The courts may competently construe this phrase by appropriately restricting its

APPENDIX C***Memorandum and Order of the Erie County Court
Dated May 3, 1982***

meaning (see *People v Illardo*, 48 NY2d 408). This phrase when measured by common understanding and practice adequately establishes sufficient warning as to the conduct to be avoided. Furthermore, none of the present defendants are in position to maintain uncertainty insofar as their acts are concerned.

The judgments against Robert Uplinger and Fredericka Sanders are affirmed; and the order dismissing the charge against Susan Butler is reversed and the case remitted to the City Court of Buffalo for further proceedings.

This memorandum constitutes the order of the Court.

Joseph P. McCarthy
J.C.C.

DATED: Buffalo, New York
May 3, 1982.

APPENDIX D
MEMORANDUM AND ORDER IN
PEOPLE v. UPLINGER
DATED NOVEMBER 9, 1981

CITY COURT OF BUFFALO

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

vs.

ROBERT UPLINGER,

Defendant.

Docket No. 4C 58993

The defendant is charged with soliciting a plainclothes policeman on a street to commit oral sex with him at his apartment. He is charged with a violation of section 240.35-3 of the Penal Law which prohibits loitering in a public place for the purpose of engaging in or soliciting another person to engage in deviate sexual intercourse. The term deviate sexual intercourse is defined only once in the Penal Law and that is as certain types of sexual conduct between persons not married to one another (Section 130.00-2). Therefore, what is proscribed by section 240.35-3 is loitering involving persons not married to one another.

The question presented by this case is whether section 240.35-3 of the Penal Law violates the equal protection clause of the fourteenth amendment of the United States Constitution in light of *People v. Onofre* (51 NY 2d 476, 434 NYS 2d 947, 415 NE 2d 936 (1980), cert. denied 101 S Ct. 2323 (1981)). *Onofre* struck down section 130.38 of the Penal Law which prohibited persons not married to one another from engaging in deviate sexual intercourse. It held that there was no rational basis to

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explain the different treatment accorded unmarried as opposed to married persons who engage in deviate sexual intercourse with one another. It found that the law was unconstitutional even as it applied to persons not married to one another who engage in deviate sexual intercourse in public. (Id 51 NY2d at 485, 434 NYS 2d at 949)

In a prior decision, this court ruled that section 240.35-3 of the Penal Law was unconstitutional in a case involving a prostitute and her customer who were engaging in oral sex in a car on a street.¹ The court held that these facts were basically the same as those in the *Onofre* decision and that, charging the defendant under the loitering statute, did not serve to distinguish the case in any way from the consensual sodomy statute which *Onofre* declared unconstitutional. At a hearing held in the instant case on the issue of the statute's constitutionality, Officer Kenneth Burgstahler of the Buffalo Police Department Vice Squad testified that section 240.35-3 is used only against prostitutes and their customers and against homosexuals. The question then presented by this case is whether the statute is likewise unconstitutional as it is applied to male homosexuals.

On its face, there would seem to be no question that the statute is unconstitutional because it is obviously applied to unmarried as opposed to married persons. However, historically, according to the testimony of Captain Kenneth Kennedy of the Buffalo Police Department Vice Squad, who testified at the same hearing, the law has always been applied to male homosexuals. He testified that it is only recently, with the advent of the *Onofre* decision, that the law has been applied to female

¹ *People v. Butler* — NYS 2d — decided September 8th, 1981.

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prostitutes and their customers in an attempt to circumvent the effect of the *Onofre* decision. Also, the predecessor statute to section 240.35-3 seemed to be directed against male homosexuals because it prohibited loitering "about any public place soliciting men for the purpose of committing a crime against nature or other lewdness" (Disorderly Conduct, former Penal Law Section 722-8; See Commission Staff Notes on the proposed New York Penal Law (the current Penal Law section 250.15). And this Court has not been able to find any reported cases under section 722-8 or section 240.35-3 that deal with anyone other than male homosexuals. Therefore, with this prospective, and especially in light of this court's holding in *People v. Butler Supra* declaring the statute unconstitutional as applied to prostitutes and their customers, the court will treat the statute as referring only to male homosexuals. If the law then is specifically aimed at homosexuals, the fact that they are not married to one another is secondary to their being homosexuals and cannot be grounds for finding the statute unconstitutional.

The larger question as to the statute's constitutionality remains since the statute is seeking to ban loitering to engage in what is now a constitutionally recognized and protected activity. The situation is very much unlike that in *People v. Smith* (44 NY 2d 613, 407 NYS 2d 462 (1978)) where the Court of Appeals upheld the constitutionality of a law proscribing loitering for the purpose of prostitution (section 240.37-2 of the Penal Law) which is a prohibited activity. But, as this court pointed out in *People v. Butler Supra*, the courts of this State have prohibited loitering to perform an act which a person may have a perfect right to perform. In *People v. Johnson* (6 NY2d 549 (1959)), the Court of Appeals upheld the constitutionality of a statute which prohibits what may amount to no more than

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simple loitering in or about schools (section 240.35-5 of the Penal Law) because of the possible danger this activity poses to children. From this and other cases, this court in *Butler* concluded that simple loitering can be legitimately banned depending on where it occurs and other circumstances. Therefore, despite the fact that persons have a lawful right to engage in deviate sexual intercourse, loitering in public for this purpose may be constitutionally proscribed depending on its effect on the public welfare. As in *People v. Smith Supra*, there must be some connection shown between the proscription and a legitimate public concern. But, because male homosexuals are being singled out from the entire population, the People must show a strong connection between their activities and the public welfare.

To determine whether such a connection exists, the court must first examine the facts of the instant case as well as the testimony derived from a hearing held to decide this issue. The court held the non-jury trial of this case after it had reserved its decision on the issue of the constitutionality of the statute at the conclusion of the hearing. Both parties had stipulated to this procedure and agreed that the court could consider the facts developed at trial as evidence also as to the issue of the constitutionality of the statute. The court has done this and reserved its decision on the question of constitutionality and, if necessary, the guilt or innocence of the defendant until now.

The facts of the case, as presented at the trial on September 24th, 1981, are that, on August 7th, 1981, an undercover Buffalo policeman, Steven Nicosia, was assigned to talk to suspected homosexuals and arrest them if he was propositioned in public. He was sitting on the steps of the Hotel Lenox at about 3:00 A.M. when he was approached by the defendant. The Hotel Lenox consists of apartments mainly for middle-

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aged and elderly people on North Street between Delaware Avenue and Irving Street in the City of Buffalo. This is a business and residential area undergoing some renewal with good quality homes and apartments close to the downtown area.

The defendant said, "Hi, how are you". After a little bit of conversation, he asked Nicosia if he wanted to get high and Nicosia said "No". He asked Nicosia what he liked to do and Nicosia said, "I don't know. What do you like to do?" This went on back and forth for a minute or so. Three or four of the defendant's friends approached and talked to the defendant. He introduced Nicosia to them. Then a police car drove up and the police told the defendant, Nicosia and the others to move on.

The defendant followed Nicosia down the street. He caught up with him and asked Nicosia if he wanted to go to his place. Nicosia asked him what he wanted to do. The defendant said, "Well, do you just want to come over?" Nicosia said, "No, I'm scared with the police. I'm going to leave". The defendant said, "If you drive me over to my place, I'll blow you". Nicosia arrested him at this point. The whole incident took between ten and fifteen minutes.

At the hearing held on September 24th and October 22nd, 1981, a local homeowner, the owner of the Lenox Hotel, the district councilman and Captain Kennedy and Officer Burgstahler testified that a number of male homosexuals would congregate on North Street between Delaware and Elmwood Avenues and, on the various street corners, soliciting companions. They testified that there was heavy automobile traffic caused by homosexuals driving through this area in response to the soliciting. Although the most the homeowner and hotel

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owner would say was that it made them "apprehensive", the court finds that this soliciting in front of and near their homes and businesses significantly interfered with the use and enjoyment and worth of the property of those in the neighborhood.

Captain Kennedy testified that he received a recent complaint from a local resident that her teenage son was afraid to leave the house because he was continually solicited by groups of homosexuals on the street corners. He received another complaint from a man who said he was afraid to pass the corner of Delaware Avenue and North Street because there were so many homosexuals there that it looked like a stag line. Captain Kennedy testified that his men made many arrests, similar to the instant one, in the area where homosexuals would solicit undercover officers.

The defendant in response states that homosexuals have a right to associate with one another in public and one aspect of this right is the opportunity to make discrete inquiries of a prospective companion to have sex in private.² The defendant concedes that the exercise of this right can effect the rights of others in the area, but states that, since the streets are public, his right to associate with his friends is equal to those of any neighboring homeowners or businessmen.

But, from the testimony at the hearing, the court finds that the offensive conduct in the area is mainly due to the activities of male prostitutes. This is not to deny that homosexuals solicit

²The defendant terms this a right of free speech and cites three States which have overturned similar laws as violative of this right (California (*Pryor v. Los Angeles Municipal Court*, 25 Cal. 3d 238 (1979)); Massachusetts (*Commonwealth v. Sefranka* — Mass. — 414 N.E. 2d 602 (1980)); Colorado (*People v. Gibson*, 184 Col. 444, 521 P. 2d 774 (1974)).

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one another, and occasionally someone else, on the streets in some numbers. But it is the male prostitutes who confront passersby with frank sex talk. They are the ones who attempt to flag down cars. All of the councilman's complaints were of the activities of male prostitutes. Also, neither the homeowner nor the owner of the hotel could recall ever hearing about anyone in the neighborhood actually having been solicited by a homosexual. Only the councilman could say that he had ever been solicited and that was by a male prostitute in the area. And, in addition, Officer Burgstahler testified that it took an average of ten minutes of talking with a homosexual to get him to solicit him so that he could be arrested. This is hardly the picture of the aggressive male homosexual.

But the homosexuals and the male prostitutes do solicit and loiter near one another on North Street and the court finds that there is a connection between the activities of these two groups. The homosexuals came to the area first, and the male prostitutes followed to ply their trade among homosexuals who would pay for younger men. There is also some interaction between the two groups who are soliciting side by side. And although, according to Captain Kennedy, there is no great incidence of crime as a result of the activities of the male prostitutes as yet, it is only a matter of time before the robberies, assaults, and even murders that are endemic to the activities of male prostitutes elsewhere will also appear on North Street.

However, based on the testimony at the hearing, the court finds that the connection between homosexuals and male prostitutes is not the main reason that the community and the

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police are opposed to this type of loitering in the area.³ The main reason is that the occasional soliciting of a teenager or others by homosexuals and the appearance of homosexuals outside homes reinforces the age-old fear that people have of homosexuals and renews the offense they take at their activities. Only part of this offense is due to the fact that some of the conduct of homosexuals takes place in public.⁴ And only part of the opposition people have to them is due to the economic loss to businesses and to the value of their homes that occurs when this activity takes place in an area. Some of the opposition is without foundation, but some also is grounded in the real possibility that a man or his son may be solicited, harrassed or confronted at the very door to his house.

The defendant answers by stating that the same objections that the community has against homosexuals can be brought against Blacks, or Spanish, or different ethnic minorities who might loiter on corners. But the Court finds that the activities of homosexuals who solicit on the streets offends the public at large wherever it occurs and the objections to it are not aimed at any specific racial or ethnic group.

The defendant also argues that new laws should be drawn to meet the specific objections that he sees to be the problem, such

³This conclusion is consistent with the fact that male prostitutes and homosexuals do not appear together in every location. According to Captain Kennedy, male prostitutes did not accompany the male homosexuals when the homosexuals solicited at some location on Seneca Street for many years. Also, there are no male prostitutes with the male homosexuals who are soliciting in LaSalle Park at present.

⁴However, the public has no way of telling the difference between a homosexual who is soliciting to take a companion back to his apartment and one who is soliciting and will commit sex in public.

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as crowding on the streets or the street corners; but the defendant admits that he himself would have trouble drawing such a law.⁵

The Court finds that homosexuals come to North Street to find a safe place to meet one another, even if it involves public soliciting. For some reason, bars and other types of meeting places, that seem to suit heterosexuals and other homosexuals, do not suffice for the homosexuals that come to North Street. There is no proof why certain homosexuals find it necessary as part of their life style to solicit a companion on the streets, but it seems to be the case. Heterosexuals and other homosexuals do not engage in this activity so that this law cannot be viewed as discriminatory in its application.

The burden of proof is on the defendant to show that the law should be found to be unconstitutional. The defendant must convince the court of this beyond a reasonable doubt.⁶ The People, through their legislators, have a wide and well recognized latitude to enact every sort of law, even stupid ones. The court finds that it cannot say that the People have failed to show beyond a reasonable doubt that a relationship exists between male homosexuals who loiter on the streets to solicit one another and a valid public purpose in prohibiting this. The

⁵See *People v. Diaz*, 4 NY 2d 469, 176 NYS 2d 313, 171 NE 2d 871 (1958) which struck down a law which prohibited loitering because there was no stated purpose or intent set forth in the statute to specify what sort of loitering.

⁶*People v. Pagnotta*, 25 NY 2d 333, 305 NYS 2d 484, 253 NE 2d 202; but see *Eisenstadt v. Baird* 405 US 438, 447, N. 7, and Gender Based Statutory Rape Legislation and the Equal Protection Clause: *Michael M. v. Superior Court of Sonoma County*, 101 S.Ct. 1200 (1981), Vol. 19 No. 1 AM. Crim. L. Rev. 99 (1981) for possible different standards.

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court finds that a sufficient connection exists between the public's loss of the use and enjoyment of its streets, businesses, and homes and the activity at issue to warrant this ban. The activity of homosexuals who loiter on the streets to solicit one another is akin to the loitering of prostitutes in its effect on the public (See *People v. Smith supra*), even though prostitution can readily be distinguished as an illegal activity. The defendant cannot create an ideal test tube situation and ask that his conduct be viewed apart from its surrounding social implications, nor can he blame the public for its reaction to his activities when the reaction is in large measure understandable.

For the foregoing reasons, the court denies the defendant's motion to dismiss the charge brought against him on the grounds that section 240.35-3 of the Penal Law is unconstitutional because it violates the defendant's rights guaranteed him by the equal protection clause of the fourteenth amendment of the United States Constitution as well as rights guaranteed him by other sections of the United States Constitution and the companion protections of the New York State Constitution. Accordingly, having heard the evidence at trial, the court finds the defendant guilty as charged.

Submit Order.

/s/ TIMOTHY J. DRURY

Timothy J. Drury
City Court Judge

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Memorandum and Order in People v Uplinger

Dated November 9, 1981

At a Trial Term of the City
Court of the City of Buffalo,
held in Part 3, Buffalo City
Court Building, this 9th day
of November, 1981.

PRESENT: Hon. Timothy J. Drury, City Court Judge

STATE OF NEW YORK — BUFFALO CITY COURT
COUNTY OF ERIE

PEOPLE OF THE STATE OF NEW YORK

vs.

ROBERT UPLINGER,

Defendant.

Docket No. 4C 58993

**ORDER ON MOTION TO DISMISS
AND VERDICT ON TRIAL**

The defendant herein having been charged with loitering for deviate sex purposes, in violation of Penal Law Section 240.35-3, and having appeared herein by his attorneys, Hodgson, Russ, Andrews, Woods & Goodyear (William H. Gardner, of counsel), and the defendant having moved this Court by Notice of Motion, dated August 8, 1981, and Affirmation of William H. Gardner, dated August 8, 1981, for an Order dismissing the charges on the grounds that the Information failed to state the commission of an offense (Gardner Affirmation, paragraph 2), and that Section 240.35-3 of the Penal Law is unconstitutional, and the People having appeared by Edward C. Cosgrove, District Attorney of Erie County (Thomas W. Lokken,

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Assistant District Attorney, of counsel), and having submitted the Responding Affirmation of Thomas W. Lokken, dated September 23, 1981, in opposition to defendant's motion, and the Court having conducted a pre-trial hearing on September 24 and September 25, 1981, on the application of the People, and having received thereat testimony from the following persons:

- (a) Captain Kenneth Kennedy, Chief of the Bureau of Vice Investigation of the Buffalo Police Department;
- (b) Timothy A. McCarthy, a homeowner and resident of the area whereat the alleged offense occurred;
- (c) Robert Freudenheim, the owner of the Lenox Hotel on North Street, Buffalo, New York, in the area of which the alleged offense occurred;
- (d) William L. Marcy, Jr., a member of the Common Council of the City of Buffalo, representing the councilmanic district wherein the alleged offense occurred;
- (e) Kenneth Burgstahler, a Buffalo police officer assigned to the Bureau of Vice Investigation of the Buffalo Police Department;

and the defendant having, in open court, withdrawn his motion to dismiss the Information on the ground that the Information failed to state the commission of an offense (Gardner Affirmation, paragraph 2), leaving only the question of the constitutionality of the statute for decision by the Court, and the Court having thereupon closed the pre-trial hearing and having taken the matter under advisement, and the People and the defendant having then consented to an immediate trial, and, further, having consented that any testimony taken at the trial might be considered as further evidence upon the pre-trial hearing, and the Court having thereupon held a trial, and

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having heard the testimony of Steven J. Nicosia, a Buffalo police officer assigned to the Bureau of Vice Investigation and the arresting officer herein (having been presented by the People), and the defendant having presented no evidence but having moved to dismiss the charges both at the conclusion of the People's case and after resting the defense case, and the Court having then taken the trial under advisement concurrently with consideration of the defendant's pre-trial motion for dismissal of the charges;

And the Court having, on its motion and with the consent of the People and the defendant, reopened the hearing on the pre-trial motion for dismissal of the charges and having taken further proof on October 22, 1981, at which time the Court heard further testimony from Captain Kenneth Kennedy and from Buffalo Police Officer Steven J. Nicosia, and the Court having again reserved decision on the defendant's pre-trial motion and on the evidence submitted at the trial;

And the Court having thereafter issued its Memorandum Decision herein on November 9, 1981, and having filed the same, and having ruled therein that the statute, Penal Law Section 240.35-3, when enforced against homosexuals, is constitutional, for the reasons more particularly stated therein.

NOW, on motion of Edward C. Cosgrove, Erie County District Attorney (Thomas Lokken, Assistant District Attorney, of counsel), it is

ORDERED, that defendant's motion to dismiss the charges on the ground that Penal Law Section 240.35-3 is unconstitutional is in all respects denied; and it is further

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ORDERED AND FOUND, on the evidence submitted at the trial, that the defendant is guilty of the offense charged; and it is further

ORDERED, that the defendant appear before the Court on November 16, 1981, at 2:00 P.M. of that day, for sentencing.

DATED: Buffalo, New York
November 9, 1981

/s/ TIMOTHY J. DRURY
Timothy J. Drury,
City Court Judge

APPROVED AS TO FORM AND SUBSTANCE:
EDWARD C. COSGROVE, District Attorney

By: /s/ VINCENT M. GAUGHN, JR.
Assistant District Attorney

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR

By: /s/ WILLIAM H. GARDNER
William H. Gardner

APPENDIX E
DECISION AND ORDER IN *PEOPLE V BUTLER*
DATED SEPTEMBER 8, 1981

CITY COURT OF THE CITY OF BUFFALO
COUNTY OF ERIE

—
PEOPLE OF THE STATE OF NEW YORK

Plaintiff

vs.

SUSAN BUTLER

Defendant

Docket No. 4C-53628

DECISION

The question presented by this case is whether Section 240.35-3 of the Penal Law, which prohibits loitering in a public place for the purpose of engaging in or soliciting another person to engage in deviate sexual intercourse, is constitutional in light of *People v. Onofre* (51 NY 2d 476, 434 NYS 2d 947, 415 NE 2d 936 (1980), cert. denied 101 S Ct. 2323 (1981)). In *Onofre* the Court of Appeals struck down Section 130.38 of the Penal Law which prohibited persons not married to one another from engaging in deviate sexual intercourse. The term deviate sexual intercourse is defined only once in the Penal Law and that is as certain types of sexual conduct between persons not married to one another. Therefore, what is proscribed by Section 240.35-3 is loitering involving parties not married to one another.

The *Onofre* case ruled that the consensual sodomy statute was unconstitutional because there was no compelling reason shown to abridge the defendant's right of privacy to engage in certain types of sexual conduct nor any justification given to

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*Decision and order in People v Butler**Dated September 8, 1981*

explain the different treatment accorded unmarried as opposed to married persons. Therefore, the question before this Court is whether there is any rational basis to justify a prohibition against loitering for a purpose which one has a recognized and protected right to engage in, and whether there is reason to warrant enforcing this prohibition against persons not married to each other.

In deciding this question, it is well to recognize first that it is not the purpose or intent that an individual might have that is being proscribed, but it is loitering with this purpose or intent that is the subject of this statute (See *People v. Diaz* 4 NY 2d 469, 470-1 (1958)). Therefore, it may be that a person might have a perfect right to perform some act that he or she might not be allowed to loiter to do.

Also, the Court of Appeals has recognized that what may amount to no more than simple loitering can be legitimately prohibited depending where it occurs and other circumstances, for instance, in *People v. Johnston* (6 NY 2d 549 (1959)), the Court of Appeals upheld the constitutionality of a statute which bans loitering in or about schools (Section 240.35-5 Penal Law) because of the danger this posed to children from drug peddlers and sex offenders and because of the danger of fire to the school building. In *People v. Merolla* (9 NY2d 62, 211 NYS 2d 155, 172 NE 2d 541 (1961)), the Court of Appeals likewise upheld a ban on loitering on wharfs and docks because these were areas where the likelihood of illegal activity was notorious. Similarly, a statute forbidding loitering about toilets and railway platforms has been upheld (*People v. Bell*, 306 NY 110, 115 NE 2d 871 (1953)). Therefore, the mere fact that an activity is innocent or legitimate does not decide the matter. What is significant are the facts of this particular case and the reasons offered by the People to show that the law is necessary.

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The facts of the case are that the defendant was a known prostitute and, on April 1st, 1980 about 4:00 in the morning, she was observed waving at cars at the intersection of Genesee and Davis Streets in the City of Buffalo. This is an area frequented by prostitutes. The defendant approached the co-defendant's car and, after a conversation, she got in. They were found a short time later parked nearby engaging in deviate sexual intercourse. They were not married. The co-defendant requested and was granted an adjournment in contemplation of dismissal (Section 170.55 of the Criminal Procedure Law). He does not wish to contest the constitutionality of the statute.

At a hearing, pursuant to the defendant's motion attacking the constitutionality of the statute, Captain Kenneth P. Kennedy of the Buffalo Police Department Vice Squad testified and defended the police policy of making arrests under this statute. He said it was necessary to control vice in this and other neighborhoods. He testified that he had received a great many complaints from residents in this neighborhood of sexual activity occurring in public. Residents complained of couples having sex in cars parked on neighborhood streets, parked in alleys and even in back yards. They complained that this conduct occurred in the daytime in cars parked on the street where schoolchildren could observe it.

No neighborhood or community can tolerate these conditions and, obviously, they are the legitimate concern of the police. But this Court and other Courts are concerned about the type of statute that is being employed to correct conditions of this sort and the manner in which it is being employed.

The *Onofre* case for the most part discussed a type of private and discreet sexual conduct very unlike the situation depicted in this case. But *Onofre* also dealt specifically with this sort of

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Dated September 8, 1981

conduct. In *Onofre* the Court of Appeals stated that an individual's right of privacy did not extend to consensual sodomy that occurs in public. However, the Court found that the equal protection clause of the Fourteenth Amendment of the United States Constitution prohibited a State from banning consensual sodomy, even in public, between persons not married to one another. (See *Onofre supra* 485). The Court of Appeals reached this decision after the People were given full and ample opportunity to show "some ground of difference that rationally explains the different treatment accorded married and unmarried persons" (*Ibid*, 491, quoting *Eisenstadt v. Baird*, 405 US 438, 447 (1971)). The Court found that there was none.

In the instant case, it would be foolhardy to deny that there is not some connection between loitering to engage in deviate sexual intercourse and the open display of sexual conduct that offends the public. But there has been nothing shown in this case to differentiate the display of sexual conduct that Captain Kennedy testified to from the circumstances that existed in and were before the Court of Appeals in the *Onofre* case. Two of the three cases dealt with in *Onofre* concerned parties having sex in automobiles parked on city streets, and in one case, it was in a residential area. And there is nothing to indicate that the loitering aspect of the statute adds anything to the instant case or serves to distinguish it in any way from the *Onofre* decision.

What the public is complaining about is really the activities of prostitutes and the laws against prostitution and loitering for the purpose of prostitution would seem to constitute adequate safeguards against those abuses. Perhaps a law forbidding the public display of sexual conduct would be an added measure to this end and it would serve the purpose of actually dealing with

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the conduct that offends the public as opposed to whatever effect that the loitering statute might have.

For the foregoing reasons, the Court is constrained to find that the statute prohibiting loitering to engage in deviate sexual intercourse is unconstitutional because it violates the equal protection clause of the Fourteenth Amendment of the United States Constitution.

But there is another and equally fundamental problem in the enforcement of this statute that also affects its constitutionality that was disclosed at the hearing held to determine this issue. At the hearing, the arresting officer, Kenneth H. Burgstahler, testified that 99% of the women arrested under this statute are prostitutes and that they are charged when the police do not have enough evidence to charge them with prostitution (Section 230.00 of the Penal Law) or loitering for the purpose of prostitution (Section 240.37-2 of the Penal Law). He testified that, in the instant case, the defendant was charged with loitering to engage in deviate sexual intercourse so that her co-defendant could be charged also. He said otherwise, the police did not have sufficient grounds to charge him with anything else. Therefore, the co-defendant was charged because he patronized a prostitute (a violation of Section 240.03 of the Penal Law), an accusation that could not be sustained in court. It would appear that the police had sufficient evidence to charge the defendant with loitering for the purpose of prostitution. If charging her co-defendant was not a factor.

This case illustrates the problem with using the statute prohibiting loitering to engage in deviate sexual intercourse to fight prostitution. The problem is that the determining factor as to who or who is not charged under this statute, in other words, who or who is not a prostitute or a prostitute's

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customer, is not part of the crime and that factor does not come to court and is never litigated in court. Therefore, the police have the sole discretion in determining who is or who is not to be arrested, and no court or jury ever decides or reviews this critical fact. Such unfettered discretion is totally unacceptable, and a former loitering statute was struck down by the Court of Appeals for this very reason (See *People v. Berck* 32 NY 2d 567, 347 NYS 2d 33 (1973), cert. denied 414 US 1093 (1973)). Therefore, the Court finds that the statute prohibiting loitering to engage in deviate sexual intercourse is unconstitutionally vague in violation of the Fourteenth Amendment of the United States Constitution because, by allowing the police such discretion, it encourages arbitrary and discriminatory enforcement of the law.¹

In reaching its decision on the constitutionality of the statute on the two grounds as set forth, the Court does so only as the statute applies to the particular facts and circumstances before it. Other facts may warrant an entirely different decision, particularly in light of *People v. Smith* (44 NY 2d 613, 407 NYS 2d 462 (1978)), which upheld the constitutionality of the statute which prohibits loitering for the purpose of prostitution (Section 240.37-2 of the Penal Law) on the grounds that this activity interfered with the commercial life and the public use and enjoyment of the streets and other areas effected.

¹See contra *People v. Willmott* 62 Misc. 2d 709, 324 NYS 2d 616 (Justice Court 1971), which predated the *Onofre* decision and did not deal with the arbitrary enforcement of the statute.

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Accordingly, the charge against the defendant is hereby dismissed.

Submit Order.

/s/ TIMOTHY J. DRURY

Timothy J. Drury
Associate Judge

At a Term Part 3 of the City
Court of Buffalo, held in and
for the County of Erie, at the
Buffalo City Courthouse
located in the County of Erie,
State of New York, on the 8th
day of September, 1981

PRESENT: Hon. Timothy J. Drury,
Justice of City Court

PEOPLE OF THE STATE OF NEW YORK

Plaintiff

-vs-

SUSAN BUTLER

Defendant

A motion having been made by the above named Defendant to dismiss the information as defective pursuant to Section 170.35 of the Criminal Procedure Law, and the said motion having only come on to be heard before me.

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Now upon reading and filing the memorandum of law submitted in support of said motion, and the information herein, all submitted in support of said motion, and upon all other papers and proceedings heretofore had herein, and after hearing Richard A. Boccio, Attorney for said Defendant, Veronica D. Thomas, of Counsel, and Hon. Edward C. Cosgrove, District Attorney of Erie County, Daniel R. Slade of Counsel, in opposition thereto, and due deliberation having been had thereon, and upon filing the opinion of the Court, it is hereby

ORDERED that the information be, and hereby is dismissed and it appearing to the Court that the statute defining the offense with which the Defendant is charged in the particular instance is unconstitutional, it is further

ORDERED that the Defendant be and hereby is discharged from custody and that her bail be and hereby is exonerated.

ENTER

/s/ TIMOTHY J. DRURY
Justice of the City Court
Of Buffalo

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No. 82-1724

**In The
Supreme Court of the United States**

OCTOBER TERM, 1983

Office - Supreme Court
FILED
NOV 17 1983
ALEXANDER L. STEVA
CLERK

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER and SUSAN BUTLER,

Respondents.

**ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS**

JOINT APPENDIX

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**PETITION FOR CERTIORARI FILED APRIL 22, 1983.
CERTIORARI GRANTED OCTOBER 3, 1983.**

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PLEADINGS REPRODUCED IN PETITION FOR CERTIORARI

Decision in Question

Uplinger and Butler Remittitur and Memorandum of
New York Court of Appeals dated February 23, 1983
[Memorandum reported at 58 N.Y.2d 936, 460
N.Y.S.2d 514, 447 N.E.2d 62 (1983)]..... Appendix A&B

Other Decisions

Uplinger and Butler Memorandum and Order of Erie
County Court (McCarthy, J.) dated May 3, 1982
[Reported at 113 Misc.2d 876, 449 N.Y.S.2d 916
(County Court, 1982)]. Appendix C

Uplinger Memorandum and Order of Buffalo City
Court (Drury, J.) dated November 9, 1981 [Reported
at 111 Misc.2d 403, 444 N.Y.S.2d 373 (City Court,
1981)]..... Appendix D

Butler Decision and Order of Buffalo City Court
(Drury, J.) dated September 8, 1981 [Reported at 110
Misc.2d 843, 443 N.Y.S.2d 40 (City Court, 1981)].
..... Appendix E

**RELEVANT
DOCKET ENTRIES**

A. New York v. Robert Uplinger

- 8/7/81 Defendant Uplinger arrested for violation of New York Penal Law §240.35-3
- 8/8/81 Motion papers (Notice of Motion and Affirmation of William H. Gardner, dated August 8, 1981) served by Uplinger challenging constitutionality of Penal Law §240.35-3.
- 8/14/81 Arraignment, Buffalo City Court (Drury, J.).
- 9/23/81 Responding Affirmation of Thomas W. Lokken, Assistant District Attorney served in opposition to Uplinger's motion.
- 9/24/81 Pre-trial hearing held before the Buffalo City Court (Drury, J.) on Uplinger's motion for dismissal based on alleged unconstitutionality of statute, with testimony of various witnesses being taken.
- 9/25/81 Pre-trial hearing continued; trial conducted (Drury, J.).
- 10/22/81 Pre-trial hearing reopened at request of Trial Judge, with consent of counsel.
- 11/9/81 Memorandum Decision and Order issued by Buffalo City Court (Drury, J.) denying Uplinger's motion and finding defendant guilty [See Petition for Certiorari, Appendix D].
- 11/16/81 Uplinger sentenced; Notice of Appeal filed.
- 12/14/81 Order of Erie County Court (Dillon, J.) that appeals on Uplinger and Butler be heard jointly.

- 5/3/82 Memorandum and Order of the Erie County Court (McCarthy, J.) affirming Robert Uplinger's conviction and reversing dismissal of information as to Susan Butler. [See Petition for Certiorari, Appendix C].
- 5/25/82 Order granting leave to appeal to the New York Court of Appeals entered (Jasen, J.).
- 2/23/83 Memorandum Decision and Remittitur of the New York Court of Appeals reversing conviction and declaring New York Penal Law §240.35-3 unconstitutional. [See Petition for Certiorari, Appendix A&B].
- 4/22/82 Petition for Certiorari filed.
- 10/3/83 Order of United States Supreme Court granting Certiorari.

B. New York v. Susan Butler

- 4/1/81 Defendant Butler arrested and arraigned for violation of New York Penal Law §240.35-3.
- 5/8/81 Proceedings on oral motion to dismiss based on unconstitutionality of statute. Testimony presented.
- 5/28/81
- undated Memorandum Decision of Buffalo City Court (Drury, J.), granting motion and finding statute unconstitutional as applied to alleged prostitutes in heterosexual situations. [See Petition for Certiorari, Appendix E].
- 9/8/81 Order of Buffalo City Court (Drury, J.) dismissing charge.
- 10/2/81 Notice of Appeal filed by People.

- 12/14/81 Order of Erie County Court (Dillon, J.) that appeals on Uplinger and Butler be heard jointly.
- 5/3/82 Memorandum and Order of the Erie County Court (McCarthy, J.) reversing Butler dismissal. [See Petition for Certiorari, Appendix C].
- 5/25/82 Order granting leave to appeal to the New York Court of Appeals entered (Jasen, J.).
- 2/23/83 Memorandum Decision and Remittitur of the New York Court of Appeals reversing decision below and declaring New York Penal Law §240.35-3 unconstitutional. [See Petition for Certiorari, Appendix A&B].
- 4/22/83 Petition for Certiorari filed.
- 10/3/83 Order of United States Supreme Court granting Certiorari..

STATE OF NEW YORK — COUNTY OF ERIE
CITY COURT OF BUFFALO

THE PEOPLE OF THE STATE OF NEW YORK,

vs.

SUSAN BUTLER,

Defendant.

DOCKET NO.: 4C-53628.

[A37]

* * *

KENNETH BURGSTAHLER, 74 Franklin Street, Buffalo, New York, having been duly called and sworn as a witness on behalf of the People, was examined and testified as follows:

EXAMINATION BY THE COURT:

Q. I understand from the information you arrested on [sic] Susan Butler at an address at 64 Reed Street back on April 1st, 1980 [sic], at about 4:00 in the morning? A. No, Your Honor. That's on Military time, that was twenty minutes to 1:00.

Q. I'm sorry. Sir, could you tell me what led up to this? A. Yes, Your Honor. We were assigned to the Vice Squad and we were checking the Genesee Street area which is a well known area for prostitutes to congregate, I was driving an unmarked police car and I noticed Susan Butler who I have arrested several times in the past, she's a convicted prostitute, she was standing on the corner of Genesee and Camp, this is one block east of Jefferson. I got into a position where she didn't notice the car and I watched her for approximately ten minutes, during this period I noticed

[A38]

her waving to the passing vehicles and at one point I noticed a Buick pull up on David Street — excuse me. Did I say Camp Street before?

Q. Yes. A. I'm sorry, David. I noticed a Buick pull up on David Street. Susan Butler walked up and the car pulled up to the side and it appeared she was having a conversation with the male for approximately two or three minutes. At this point Susan Butler walked around the side of the car, entered the vehicle and the car then backed down David Street. At this point I drove around the block, I walked up to the car and I noticed the defendants were engaged in oral sodomy.

Q. Oral sodomy? A. At this point I identified myself and again Susan Butler at this point knew me and I arrested both defendants for loitering to commit a deviate act.

Q. You didn't arrest them for the deviate act because at that point at that date the Court of Appeals had affirmed People versus Onofre and had stricken the sodomy statute? A. Right. I did not arrest them for the sodomy statute because that was stricken out, but in my opinion under that loitering section they matched every degree of crime. Susan Butler

[A39]

could have been arrested for loitering for the purpose of prostitution because — being the fact I had to prove something on the male when they're engaged in this act of sodomy, I believe at that point they matched loitering to commit a deviate act.

Q. If you remember, his case is now disposed of — you may not know this — but through an adjournment in contemplation of dismissal with the District Attorney's Office. A. I was here yesterday.

Q. Yes; that's true. So, you feel from what you saw as to what she did in trying to stop different cars — how many cars did she try to stop? A. There were three or four that she waved to during this ten minute period.

Q. You feel under the cases you've had here in City Court, I think the main case for the loitering for the purpose of prostitution is People versus Smith and the Court of Appeals upheld that sort of charge for loitering for prostitution; you felt you had enough there for at least prostitution, that you wanted to encompass both of them? A. Yes. I did.

Q. Is this charge as a violation or misdemeanor? A. No. It's only a violation.

[A40]

THE COURT: Do you want to question, either side?

DIRECT EXAMINATION BY MR. SLADE:

Q. Officer, did you have any evidence in this case of a fee for this service or that a fee had been paid for this act of oral sodomy? A. Well, I didn't have any evidence up to that time. Off the record the male did tell me he paid a fee.

Q. This was after? A. This was after, this was off the record.

Q. So, it was only after the arrest of the male that you discovered some evidence that a fee had been paid?

MISS THOMAS: I'll object to this line of questioning, it's not relevant to the issue before the Court.

THE COURT: It's also hearsay, sustained.

MR. SLADE: Your Honor, the relevance of this is in defining why the officer charged this particular charge rather than some of the other prostitutional offenses which were available to him potentially.

THE COURT: Well, if you can tie it in any other way.

BY MR. SLADE:

Q. So, at the point you approached the car, you had no direct evidence of a fee? A. That's right. I did not have any evidence and—

[A41]

Q. And you've testified that it was your intention to bring charges against both parties in this instance? A. Yes, because I felt he was as guilty as she was.

Q. Is this a normal routine you do in these cases, arrest both parties? A. Yes. It is.

MR. SLADE: That's all I have, Your Honor.

CROSS EXAMINATION BY MISS THOMAS:

Q. Officer Burgstahler, you said you saw my client waving to cars? A. Yes. I did.

Q. Did you hear her engage in any conversation with anyone in these cars? A. No. I did not.

Q. Did you hear her engage in any conversation with her co-defendant in this case? A. No. I did not.

Q. Did you see any money exchange hands? A. No. I did not.

Q. How far away from my client were you when you first cited [sic] her? A. Well, I was driving a police car and I passed by her, she was on the corner and I passed by her when I set-up for

[A42]

observation, I was probably two to three hundred feet away.

Q. Two to three hundred feet away? A. That's correct.

Q. And all you saw her doing was waving at cars? A. That's correct.

Q. You don't know why she was waving at the cars, do you, of your own direct knowledge? A. Well, being an experienced Vice Officer—

Q. I said of your own direct knowledge? A. No.

THE COURT: Anything else?

MR. SLADE: Nothing further.

THE COURT: What it boils down to, the reason you charged both of them, is to get him because otherwise you would have charged her for loitering for the purpose of prostitution?

THE WITNESS: That's correct.

THE COURT: Okay, anything else?

MISS THOMAS: Nothing.

THE COURT: Thank you, Officer. All right, It would appear with his case dismissed do you want to proceed with this prosecution against her?

MR. SLADE: His case is not yet dismissed.

[A43]

THE COURT: It's an A.C.D.

MR. SLADE: It's at the A.C.D. stage.

THE COURT: Yes.

MR. SLADE: We do.

THE COURT: It's too late now to change it because she was charged under one section where according to the officer she very well could have been charged with loitering for the purpose of prostitution, if you were to change the charge now it would be dismissed for lack of speedy trial as a violation. Do you want to stick with prosecuting her?

MR. SLADE: Yes. The thinking here is the A.C.D. for the "John" in the situation is the fact of having his name printed in the papers, going through the Court proceeding, a man with no prior record who is rather embarrassed by this situation, it serves as a specific deterrent [sic] against further conduct of this type by him and also as a general deterrent [sic]. The man's name appeared in the papers, people see that and perhaps avoid making this type of street conduct. We prosecute the women with the prostitution records, in this instance, feeling she's more culpable, she's out there as a

[A44]

professional street walker engaging in this routinely and we prosecute these to a conviction as charged or to a trial. At any rate, because we're feeling their conduct as being a more serious crime to the public.

THE COURT: Officer Burgstahler, one other question. There's no question of anybody being in any shops or property owners or people being offended by this at this time of night or this area because there's nothing going on there except prostitution.

THE WITNESS: Well, I suppose you could say that.

THE COURT: In that area, that's close to downtown, there's no body downtown saying well, these people are disturbing my sleep or harming my store or my business because there's no business there or no people there. Is that right?

THE WITNESS: Well, I suppose you could say that but I've got a job to do to enforce the laws of prostitution.

THE COURT: I know we're dealing with prostitutes being charged under the deviate intercourse statute—

THE WITNESS: Right.

THE COURT: That sort of thing?

[A45]

THE WITNESS: Yes.

THE COURT: Okay, Captain Kennedy will be next.

(CAPTAIN) KENNETH KENNEDY, 74 Franklin Street, Buffalo, New York, having been duly called and sworn as a witness on behalf of the People, was examined and testified as follows:

EXAMINATION BY THE COURT:

Q. You're the captain in charge of the Buffalo Police Department? A. Yes.

Q. You've been doing that for how long? A. For approximately twenty-five years, now.

Q. You've heard the testimony of Officer Burgstahler? A. Yes.

Q. In light of the Onofre case where I discussed with you a minute ago on the record, I believe, which says that there's no problem that they've stricken down the sodomy statute in New York State, the consensual sodomy statute, the Supreme Court went along with that or at least didn't hear the appeal so by doing that they affirmed it. In these situations obviously, your police will not be arresting anybody for loitering for the purpose of deviate sexual intercourse for anything other than prostitution or homosexual offenses?

[A46]

A. Yes. That's generally it, Your Honor, or these open acts that are taking place, we're using that section now where we formally used to use it for sodomy acts and they also use it where there's solicitation by homosexuals, they'll use that section.

Q. But when you say open acts, you're not using this, you only use this to connect with some sort of prostitution where they suspect or know it's prostitution? A. No, Your Honor. If anyone, it wouldn't necessarily have to be a prostitute but generally there's evidence that indicates she is involved in prostitution but if anyone was to get into a car and drive to a public street and commit this type of act we would use that section, even if it was two men we would use that section.

Q. The two men situation, that's what I mean. Let's say your officers or some officer found a couple in a park and there's no evidence of prostitution, they wouldn't be arrested, would they, male and female? They never have, have they? A. Depending on the circumstances generally — well, not if it would indicate that there were no involvement in prostitution but if they're in the area where there's prostitutes, where there's homosexuals or where we have complaints of people being disturbed and of these acts being committed

[A47]

where people can see them, many times we'll get complaints from people who are in an apartment or in a room and they look out and these acts will be taking place.

Q. That would be downtown, maybe Johnson Park area? A. There, Your Honor, yes. We have them there and in Genesee Street, Genesee and Spring.

Q. You got complaints in there? A. Yes. An awful lot of complaints. In fact, there's some woman that calls me and calls the Police Commissioner, she's wrote to the Mayor and she is very very much disturbed because people pull in the backyard and they commit these acts right in front of her, in front of her to the extent she's looking out her apartment window and everything is right in plain view.

Q. This, to the best of your knowledge, would be in the same area or near the same area as where the prostitutes work?

A. Yes. The whole Genesee Street area and David Street is up a little further but then Spring Street is one where we had particular bad complaints and the business people around there are complaining. In fact, we have made arrests in sodomy situations at 12:00 o'clock noon on the street in that area where school children were going to school and simply by their being in the presence on the sidewalk they

[A48]

could look right in the car and see this man and woman in an act of sodomy.

Q. This again, would be prostitution related? A. Yes, it would be prostitution related, even though there wouldn't be any conversation or any direct evidence except she would be on the corner and he would be cruising around in the street for quite some time; but nothing we can prove to substantiate the charge of prostitution but I would say it would indicate prostitution.

Q. Officer Burgstahler said he had proof of prostitution but didn't want to use it to get the male. Is that right? A. Well, yes, if there's no evidence against him.

Q. Now, if there would have been further investigation and other evidence would have developed concerning the prostitution then they would be — both could have been arrested for prostitution? A. True, male and female.

Q. So you don't believe Onofre should be applied for loitering for the purpose of prostitution? A. Pardon?

Q. You don't believe the Onofre decision should be applied to this sort of situation? A. I don't feel the Onofre case should be applied for loitering

[A49]

for the purpose of committing deviate sexual intercourse.

Q. And the reason is you have this activity going on?
A. Right.

Q. In cars and it's related to prostitution? A. Yes. It is definitely related to prostitution.

Q. And these situations where you can't prove it through the ordinary loitering for the purpose of prostitution? A. That's correct.

Q. And if there isn't enough evidence of loitering for the purpose of prostitution then you have the two people involved in this act so therefore they are both arrested and we apply this section? Of course, the other — some proposals are that they make it illegal to have sexual displays in public, in a car would be a situation construed as public — A. Yes.

Q. — what do you think about that? A. We actually have some type of law that we can apply. If the sodomy laws are stricter then there should be some type of law that would apply more directly to a type of ordinary sex act or deviate sex act, but, mainly open sex acts, public lewdness or something like that should be more specific so we could apply that. My only interest is in protecting

[A50]

the public from these things on the appearance of it. Some people may be under the impression that they're in private but it's not as if they were in a park or down by a railroad yard where there's no houses around, it's surprising the amount of people that are watching activity and that are subject to it and deem it offensive. I not only had this one woman call me but I had another woman who was constantly calling me who said they were performing these acts day and night in the Genesee Street area.

Q. Of course, this again, does not have anything to do with the homosexual activity? A. No.

Q. That's entirely something different? A. Right.

THE COURT: I understand your feeling on that. Does anybody want to ask any questions?

MR. SLADE: No. I don't have any questions.

MISS THOMAS: I don't have anything.

THE COURT: Thank you very much, Captain Kennedy. I'll reserve on this. That's all.

* * *

STATE OF NEW YORK — COUNTY OF ERIE
CITY COURT OF BUFFALO

THE PEOPLE OF THE STATE OF NEW YORK,

vs.

ROBERT UPLINGER,

Defendant.

DOCKET NO.: 4C-53993

[R38]

S I R :

PLEASE TAKE NOTICE that on the Information herein, dated August 7, 1981, and on the annexed affirmation of William H. Gardner, dated August 8, 1981, defendant will move this Court (Hon. Timothy J. Drury, Buffalo City Court Judge, presiding) at the arraignment of the defendant herein, scheduled to be held before Judge Drury on Friday, August 14, 1981, at 9:30 A.M. or as soon thereafter as counsel can be heard, for an order dismissing the Information on the ground that the same fails to define an offense under Penal Law Section 240.35-3 and, in the alternative, on the ground that Section 240.35-3 of the Penal Law is unconstitutional for the reasons set forth in the annexed affirmation of William H. Gardner. PLEASE TAKE FURTHER NOTICE, that if the motion referred to herein is not heard by Judge Drury at the time of the arraignment, the same will be presented to him and argued by counsel for the defendant [R39] at the adjourned date to be set by him at the time of arraignment.

Dated: August 8, 1981

WILLIAM H. GARDNER

*Hodgson, Russ, Andrews, Woods & Goodyear, Attorneys
for Defendant*

1800 One M & T Plaza

Buffalo, New York 14203

Telephone: 856-4000

TO: Hon. Edward C. Cosgrove
Erie County District Attorney

[R40]

[Uplinger Title and Heading omitted]

STATE OF NEW YORK)

): SS.

COUNTY OF ERIE)

I, WILLIAM H. GARDNER, being a member of Hodgson, Russ, Andrews, Woods & Goodyear, attorneys of record for the defendant, make the following statement as an affirmation, in lieu of an affidavit, under the penalties of perjury.

1. Defendant has been charged with the offense of loitering for deviate sexual purposes under Penal Law Section 240.35-3, allegedly committed on August 7, 1981. The charge has been laid by an Information dated August 7, 1981, a copy of which is annexed hereto as Exhibit A. *(NOTE: The Information, attached as Exhibit A to this Affirmation, is reproduced at page R-36 of this Record and is not separately reproduced as an Exhibit to this Affirmation. Please see page R-36.)*

2. Defendant moves to have the Information dismissed on the ground that the same fails to define an offense under Penal Law Section 240.35-3 for the reason that the Information does not include facts [R41] showing that defendant remained in a public place "for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature" (Penal Law §240.35-3). Specifically, there is nothing in the Information which, on its face, indicates that defendant had the purpose of engaging in any deviate sex act with the officer. The statement attributed to the defendant, "[W]hy don't you drive me to my place and I'll blow you", does not, by itself, describe a sex act contemplated in the thinking of the defendant. No facts are included in the Information to show that these words, in the sense used by the defendant, denoted a proposed sex act or what that sex act was

or whether it was, in the words of the statute, a proposed act of "deviate sexual intercourse or other sexual behavior of a deviate nature".

3. Alternatively, defendant moves for the dismissal of the Information on the ground that Section 240.35-3 of the Penal Law is unconstitutional for any one of the following reasons:

A. Section 240.35-3 of the Penal Law (hereinafter the "statute") is unconstitutionally vague in that the words "deviate sexual intercourse" are not defined in a way which is [R42] applicable to the statute. The term is defined in section 130.00-2 of the Penal Law, but that section is, by its terms, only "applicable to this article" (i.e. Article 130 — Sex Offenses) and is not made applicable to Article 240.

B. Section 240.35-3 of the Penal Law is unconstitutionally vague in that the words "or other sexual behavior of a deviate nature" are not defined anywhere in the Penal Law and are not so certain that they give notice to the public as to what is required to be done or not done in order to comply with the statute.

C. Section 240.35-3 of the Penal Law is unconstitutional because it violates the defendant's rights to due process of law and freedom of speech. This is so because it prohibits the discreet, non-obtrusive solicitation in a public place of sexual conduct to be performed in a private place, even though such sexual conduct in a private place is lawful, pursuant to the holding of the Court of Appeals under *People v. Onofre*, 51 N.Y.2d 476 (1980). [R43] As such, it violates the defendant's rights of free speech, which permit him to invite another person to his apartment to engage in conduct not constituting a crime or offense under the laws of the State or of the United States. In the context

of free speech rights under the United States Constitution, the activity engaged in by defendant is the same as that found to be protected by free speech guarantees by the Supreme Courts of California (*Pryor v. Los Angeles Municipal Court*, 25 Cal.3d 238 [1979]) and of Massachusetts (*Commonwealth v. Sefranka*, — Mass. —, 414 N.E.2d 602 [1980]). For purposes of this motion, defendant asserts both his free speech rights under the United States Constitution and under the New York Constitution.

D. Section 240.35-3 of the Penal Law is further unconstitutional for the reason that it constitutes an impermissible intrusion on defendant's rights to due process and to free speech (free thought), since it declares one a violator for merely being in a public place and thinking lascivious thoughts. All that is required for [R44] guilt is the physical location of defendant in a public place and the existence of a mental state of a "purpose" or intent as described in the statute, whether he acts on the purpose or intent or not. This ground of declaration of unconstitutionality has been approved by the Supreme Court of Colorado (*People v. Gibson*, 184 Col. 444, 521 P.2d 774 [1974]).

E. The statute is further unconstitutional for the reason that it violates defendant's rights to the equal protection of the laws. This is so under the following circumstances:

(a) Although "deviate sexual intercourse" is lawful in private places to the same extent as is so-called "normal" heterosexual conduct, loitering for the purpose of soliciting the former is made unlawful, while loitering for the purpose of soliciting the latter is lawful.

(b) The engagement in sexual conduct of a deviate nature and similar engagement in sexual conduct of a "normal" nature in a public place are equally unlawful as "public [R45] lewdness" under Penal Law Section 245.00. However, loitering for the purpose of the former is unlawful, while loitering for the purpose of the latter is lawful.

The Legislature has not made a rational or proper classification for purposes of this section. Without limiting his grounds under this motion, defendant argues that the People must show a compelling justification for the classification which has been made and that, absent that, the law should be found to have violated the defendant's rights to the equal protection of the laws.

As to all grounds of unconstitutionality urged herein, defendant rests his argument under both the United States Constitution and the equivalent protections of the New York Constitution. If the Court determines that the law is not unconstitutional under the United States Constitution, defendant requests that the Court nonetheless determine that under a broader reading of the New York Constitution, the law is unconstitutional.

Dated: Buffalo, New York
August 8, 1981

s/William H. Gardner
William H. Gardner

. . .

STATE OF NEW YORK — COUNTY OF ERIE
CITY COURT OF BUFFALO

THE PEOPLE OF THE STATE OF NEW YORK,

vs.

ROBERT UPLINGER,

Defendant.

DOCKET NO.: 4C-58993.

* * *

[Proceedings of September 24, 1981]

[R61]

CAPTAIN KENNETH KENNEDY, residing 3160 Hopkins Road, North Tonawanda, New York, having been duly called and sworn as a witness on behalf of the People, was examined and testified as follows:

DIRECT EXAMINATION BY MR. LOKKEN:

[R62]

Q. Captain, where are you employed? A. I'm employed by the City of Buffalo, Department of Police.

Q. And what's your unit? A. I'm a captain in the Buffalo Police Department; I'm in charge of the Bureau of Vice Investigation.

Q. And how long have you been in that position? A. Approximately twenty years.

Q. And Captain, in the course of your career in the Police Department, particularly in the Vice Squad, have you had occasion to direct your subordinates, your Police Officers, in certain areas for the purposes of arresting people for loitering on a number — on any number of grounds that may have been illegal? A. Yes, sir. I have.

Q. And does that include loitering for the purpose of engaging or soliciting other people to engage in deviate sex under Section 240.35-3? A. Yes, sir.

Q. And what circumstances do you direct your men to patrol a certain area? A. Well — of course they're instructed when they first come into the squad, they're given specialized training and they're instructed to work in areas in plain clothes where we have

[R63]

complaints or where we have information that there are possible suspects in certain areas of the city. Generally we're responding to a complaint.

Q. And what areas of the city, are now subject to those kinds of complaints? A. Well, generally, downtown areas is the heaviest concentration for vice investigations and also around North and Delaware and Genesee Streets, Elm, and in through that area.

Q. Would you include LaSalle or Front Park, in that area? A. Yes, that's definitely included.

Q. Captain, what do you know of the sorts of problems that citizens encounter in those areas that are frequently — A. Would you repeat that?

Q. What sort of problems do you know of that citizens might encounter in the areas frequented by loiters, [sic] specifically those who loiter for the purpose of engaging in deviate sex? A. Based on the complaints we receive the citizens are disturbed by activity of solicitation, appearance of street walkers, the prostitutes and also of suspected homosexuals and they complain about being solicited. They complain that their youths are being bothered, being solicited by these men and they also complaint [sic] of heavy concentration of men using

[R64]

obscene gestures and obscene language and movements, and fondling one another and we also have numerous complaints of open sex acts taking place in automobiles. We have complaints of people in the LaSalle Park area where the young lads are playing baseball and so on and being solicited. I have numerous complaints from other Police Officers as to conditions of that nature. And there's men and women that complain about the North Street area of groups of men that are annoying to them and soliciting them and bothering them on the street.

Q. Do you have any idea in general what sort of inquiries are made of these citizens? A. Pardon?

Q. What sort of inquiries or approaches are made by these people who loiter or passers by? A. Well, generally, different things. They say — this one woman complained and said —

THE COURT: Would you wait a second. I'll be right back.

(WHEREUPON, COURT STOOD IN RECESS.)

THE COURT: Excuse me Captain. Proceed. You were talking about solicitation of people in the area by

[R65]

alleged homosexuals and you talked about inquiries and you asked what sort of inquiries —

BY MR. LOKKEN:

Q. What sort of inquiries are made to passers by as they may travel down the streets directed by loiters? [sic] A. Well one woman told me, she said that her teenage boy, they approached him and that they actually asked him if he wanted to have sex with him and she said that he came home and he was very much disturbed by it and he said everytime he goes out of the house

there's always men standing around certain areas of the neighborhood and that they solicit them and she told me that she didn't think it was right and she wanted to know if the police could do something to correct that situation.

Q. And is it your opinion that solicitation is open in a sense that a lot of strangers are confronted?

MR. GARDNER: In keeping with the remarks I made in the beginning, I'm forbearing of making the usual objections of hearsay. I'll accept the Captain's opinion but I think I have to remind all of us that this is not an occasion for an opinion testimony and nor is there any

[R66]

indication that the Captain is an expert as to whether people who bring complaints to him are telling the truth or anything of that sort. In the interest of expediting the matter I'm not going to object to this because I believe the whole hearing is irrelevant to the motion.

THE COURT: You're just drawing my attention —

MR. GARDNER: I want the record to reflect.

THE COURT: You're drawing my attention to a problem.

MR. GARDNER: I don't object to the question, perhaps we can move along. He's not an expert, he's not qualified as yet, if you want to make him an expert —

MR. LOKKEN: What precisely is the nature of the objection?

THE COURT: I think he was more drawing my attention to the hearsay nature of this testimony and the fact that the Captain is not qualified as an expert.

MR. GARDNER: What I'm saying, Your Honor, I'll object formally on that on the question that it asks an opinion of the nature of the problem as the Captain perceives it in the community. It's not subject for opinion testimony and there's been no indication that the Captain is an expert on the subject, everything he's testified about

[R67]

is hearsay. I haven't heard that the Captain is out on the street himself, I haven't heard he's out observing these alleged events and on that basis I'm making an objection.

THE COURT: Sustained. Go on.

MR. LOKKEN: Is there any possibility of reply?

THE COURT: Go on.

BY MR. LOKKEN:

Q. You've been in the Vice Squad for twenty years? A. I've been Commander of the Vice Squad for twenty years. I've approximately served about twenty-eight years on the Vice Investigations at all levels; I served as a plain-clothes officer and also I've served as a Lieutenant in command of an individual squad and as a Captain in command of all of the units of the Vice Investigation.

Q. When receiving complaints I assume certain particulars are described to you. Have you had over the course of your time in the Vice Squad the opportunity to confirm whether these complaints appear to be legitimate or not? A. Yes. Numerous complaints we've received and then I personally have made visits to the scene in some cases and verified them. And then, also, there were verified — they

[R68]

were verified after I had directed my men to make an investigation. And, they've gone there and made arrests in response to various complaints.

Q. Are most of these complaints directed by people who claim not to have known the person who approached them?

A. Yes. Most of them are. Most of them say they don't know who they are but they simply approached them and that there's groups of these men in certain areas and that they — in fact, one of them said he thought it looked like a stag line and he was fearful of passing because there were so many men lined up that he didn't know what they were going to do to him; and he said he was afraid that he didn't know whether they would trip him or grab him or whatever they would do.

Q. Is there an instance of violence recorded in certain areas where perhaps those who engage in such loitering and citizens have confronted each other that you're aware of?

MR. GARDNER: I'll object and point out to the Court there's absolutely no suggestion in the complaint before the Court that there was any violence involved or suggested or any [sic] in any way involved in the situation.

THE COURT: I understand. I'll hear the question, overruled.

[R69]

THE WITNESS: May I answer?

THE COURT: Yes.

THE WITNESS: Yes. There have been acts of violence; there have been shootings, there have been stabbings, there have been numerous assaults in areas where we have received some of these complaints.

MR. LOKKEN: Okay —

THE WITNESS: And if I may add, sir, there have also been robberies. There's been robberies and assaults against some of the people in the areas.

MR. LOKKEN: Nothing further at this point.

THE COURT: Mr. Gardner?

CROSS EXAMINATION BY MR. GARDNER:

Q. With regard to the violence that you've referred to, Captain, there have been instances of violence in the middle part of the City of Buffalo for many years relating to a lot of different circumstances. Isn't that correct? A. There has been violence, yes, sir.

Q. And there's been a lot of violence that has been in some way related to drinking and bar activity. Is that correct? A. Yes, sir. I've observed that.

[R70]

Q. And has there not also been violence with respect to encounters between males and females which may or may not have had sexual overtones of some sort? A. Yes. I would say that.

Q. Sweethearts, boyfriends, girlfriends, that type? A. Yes.

Q. Have you had any occasions where you've had — that you can recall, where you've specific allegations of violence in connection with a male homosexual inviting another homosexual to his private residence for sexual purposes? A. Yes. There's been numerous investigations where male homosexuals have taken homosexuals or vice versa, or whatever have gone to the hotel rooms and there's violence that has occurred.

Q. And have you had also violence in connection with prostitution in the area? A. Yes, sir.

Q. Now you enforce, do you not, the Loitering for Deviate Sex Statute, basically against the groups which we would call prostitutes or suspected prostitutes on the one hand, and homosexuals on the other. Is that correct? A. Yes. I would say that's correct.

Q. In fact, Captain, is it not correct that in connection with

[R71]

the training you give your men and the instructions you give to them for the enforcement of the statute, you draw their attention to these particular groups as groups that should be controlled through the statute. A. Yes. We call it to their attention, particular conditions that exist, that if evidence presents itself indicating solicitation or an act taking place in their presence that they're to make an arrest whether it be a prostitute or whether it be two males engaging in an open sex act.

Q. You referred to an "Open Sex Act". It is true, is it not, Captain, that in many cases where an allegedly gay male is arrested under this statute, open sex has not occurred? A. No. That's true. It would be an offer for open sex and then if the evidence is gone enough they will make an arrest.

Q. Isn't it also true, however, sir, that if the offer is to have sex in a private residence, you still make an arrest? A. Yes. We make an arrest.

Q. So when you refer to open sex you're talking about sexual activity on the streets, in the parks, or in automobiles. Isn't that correct? A. Well, yes, since the sodomy laws have been struck down, we've been using that section where we observe people in areas where we've had complaints and so on; and then where

[R72]

we observe them engaging in open sex acts.

Q. But even before the sodomy law was struck down, it's correct, is it not, that your men will go into the areas that you described where there had been complaints or where you had information that suspected homosexuals or prostitutes were present and make themselves available for the kind of solicitation including solicitation in a private residence?

A. Well, they would be in an area on investigations and if they were approached and the conversation was such of a deviate sexual nature, then they would make an arrest.

Q. When you say "On investigations", do you mean to include downtown, the situation where they are on, say North Street for the purpose of checking out claims there that there are homosexuals loitering in that area? A. Yes. Claims and then complaints and observations of seeing people in the situations where there apparently are solicitations made or approaching other people. They will work there, that's where the investigations will be.

Q. In the complaints that you've gotten over the years, Captain, have you gotten complaints from women who have been approached with suggestions by males for sexual activity between the two of them?

[R73]

A. Now, how do you mean that, counsellor. Do you mean—

Q. For example, do you ever have complaints made to you directly or through your men that women are walking the street and are approached by men who suggest sexual activity and the women find it offensive? A. Yes. I have had complaints of that nature where there have been complaints of being solicited for prostitution purposes. Women that were walking down the street have complained to my office and to me personally that they were being bothered by men who were curb crusing [sic]

and soliciting them for the purpose of prostitution when they weren't prostitutes and were very much disturbed by that. It has happened.

Q. Has it also happened that women have just been approached for sex activity with no money being suggested? A. I don't recall of any complaints like that, counsellor.

Q. You talked in your testimony about specialized training which you give to new men in your squad? A. Yes.

Q. Would you describe for the Court what the nature of that training is and what they're taught and led to do specifically with regard to enforcing this statute? A. Well, it's generally that they're taught by officers that have been on the street for a long time. First of all,

[R74]

they're made familiar with the section that relates to that type of violation and then they are told, they are shown informations, they're shown the way — sometimes they are taken to the area and they're shown how the older officers or the officers that have been on the squad for a while, how they make an investigation. And then they are talked to and I talk to them and some of the other officers talk to them and so on, and explain to them what the law [sic] is. They explain to them how these cases can be very very damaging to an individual's reputation in the [sic] community and they're told never, never, never under any circumstances to bring in a case that they may be doubtful about as far as the evidence that they are taught as required and the evidence that's — the evidence as it presents itself. They're told we never want them to perjure themselves, that they don't want an arrest unless it's considered a good arrest by them as to check with the other officers when they first go on the street to make sure because we don't want to arrest anyone on this type of charge unless we're positively certain of what conversation took place and what action took place.

Q. In giving that advice, Captain, is it fair to say you're aware of the statute as particularly threatening to

[R75]

individuals who might be charged with this offense if in fact they weren't guilty? Different, say, then something like disorderly conduct or something of that sort? A. No. We try to be very very definite about it. In other words, there is many guidelines that are — that have set their standards that would protect or almost make it impossible for someone to become involved without a great deal of evidence.

Q. Now, when your men go out on the street, particularly the younger men who recently have had training, are they given any instructions as to how they should dress or how they should demean themselves so as to be accepted, say, by a gay person as an apparent gay potential partner? A. Part of their instructions now, for instance, if it pertains to a prosecution [sic] investigation or homosexual investigation, we tell them just look like an ordinary man would that's out on the town, that's out looking for a good time. And usually that's an expression that's used, that they should just look ordinary. We don't necessarily tell them, now that isn't to say that one of the other officers might say to wear a red sweater or a clean sweater or something similar to that, but actually the — we do not tell them to wear short shorts or something similar to that anymore than we

[R76]

would do with the police women to wear sexy looking clothing or anything, we just tell them ordinary street clothes. Maybe a little on the sporty side but we do not give them advice [sic], in other words, to wear clothing out of the ordinary.

Q. But you would expect of course that your officers would appear in such a context that they might be interested in this

kind of thing, you wouldn't send a uniformed officer out to do this work? A. Positively not. He would wear civilian clothes, he would conceal his pistol equipment.

Q. And if he were asked by some individual that he was having a conversation with, whether or not he was a Police Officer, he would of course say no? A. Positively he would deny it.

Q. And, the purpose is not true of the training and the activity of the officer who's doing the job would be to let the other person believe that the officer may be interested in the kind of thing that that person is into. Is that correct? A. Well, not necessarily so. The purpose of the training is to — is so that if he's approached and if evidence presents itself that he knows how to gather it and how to record it and how to present it to the Courts and we always tell them

[R77]

it's a decision of the Court whether a man is guilty or innocent, but the arrest factor is explained to them of what is required as far as conversation or an act is required before he can make an arrest.

Q. Finally, Captain, you referred to a lot of complaints you've had over the years. Have you kept any records of those complaints? A. Yes. There's numerous complaints and records in the Buffalo Police Department Vice Squad Complaint file.

Q. And those are complaints apart from the type of information that's filed in a particular prosecution. Is that correct? A. Yes. Those are regular complaints from citizens. In other words, if a citizen will call in the office or someone will make a complaint there will be a card made on it or else a written notation [sic] and it will be filed in the complaint file.

Q. Now, suppose you get that kind of complaint over the telephone, do you take the individual's name who's calling?

A. If he will give his name, yes, sir.

Q. Do you ultimately go out and investigate it or do you put that away in your reference file?

[R78]

A. No. When we receive a complaint it's generally placed where the men will be going on the street, where the Lieutenants and the street men will see the complaint and then they will work on that if they are in that area or they don't have other complaints to work on. Depending on the nature of the complaint, they will generally have that discretion where they work on it, you know, as they go out; in other words, they might take five, six, ten complaints with them on any given night and go out and work on them.

Q. And, you also get some complaints from people who won't give their names over the phone? A. Yes, sir. Many of them.

Q. Would you say over half of the complaints you get are by anonymous callers? A. I would say more than half. Most of the people say, I don't want to get involved in this, I don't want to give my name, or if they do they say they will give their name but they don't want to be involved in it. They will tell you it's a bad condition and they would like to see some police response.

Q. Would you say it's fair to say that less than one out of four will give their name on these complaints, complaints over the phone?

[R79]

A. I'd say a little more than.

Q. Somewhere between twenty-five percent and fifty percent would give their names? A. I would say yes.

MR. GARDNER: That's all.

MR. LOKKEN: No further questions.

BY THE COURT:

Q. Captain, these complaints you've talked about, are they recent complaints? A. Some of them are, Your Honor, some of them are within I'd say the last six months. They have been at various times but I'd say many of them are within the last year.

Q. Do they relate to the area that's involved in this case which I gather is on North between Delaware and Elmwood? A. Yes. Definitely, Your Honor.

Q. And, they deal with the activities of alleged homosexuals soliciting others? A. Yes.

THE COURT: Nothing else, thank you.

MR. LOKKEN: The People call Mr. McCarthy to the stand.

[R80]

TIMOTHY A. MCCARTHY, 64 Irving Place, Buffalo, New York, having been called and sworn as a witness on behalf of the People, was examined and testified as follows:

DIRECT EXAMINATION BY MR. LOKKEN:

Q. Mr. McCarthy, were you served with a subpoena to testify here this afternoon? A. I was.

Q. Sir, you've indicated your address was 64 Irving Place? A. That's correct.

Q. Does Irving Place — how is that related to the vicinity of Delaware and North Street in the City of Buffalo? A. Irving Place is a one way street from North Allen — the first street west of Delaware Avenue.

Q. You live at 64. How far is that from North Street? A. I'd say approximately two hundred fifty feet.

Q. Now, you've heard the testimony of Captain Kennedy, can you relate as a resident of that area any observations you might have about problems of loitering in the vicinity of North and Irving?

MR. GARDNER: I'm going to object to the form of the question.

[R81]

I think it should be more narrow.

THE COURT: More descriptive, sustained.

BY MR. LOKKEN:

Q. Mr. McCarthy, have you noticed any people who may have appeared to be homosexuals loitering in the vicinity of North and Irving? A. I can answer that by saying that since I've lived there I've seen gatherings of young males, I do not know their purposes specifically since I've never encountered them in conversation but I'd say generally there's two concentrations that I'm aware of by my living in that area, primarily on North Street near Delaware and on North Street at the corner of Irving Place and down Irving Place.

Q. What sort of activities have taken place there amongst these groups of people that you've noticed?

MR. GARDNER: I'll object for the same reason; I don't want an invitation to speech, I'd like a question which is directed to some definable area rather than an open ended question.

THE COURT: Are you questioning about the groups he's describing?

MR. LOKKEN: Yes, Your Honor.

[R82]

THE COURT: Overruled. Go on.

THE WITNESS: They stand and watch the cars go by primarily.

BY MR. LOKKEN:

Q. Do you notice any contract between them and passers-by? A. I have observed conversations between these individuals who may in fact stand in the approximate locations I've described before and drivers of automobiles.

Q. Have there been occasions when these people have entered the automobiles? A. I've not observed that.

Q. During what hours do these people gather? A. I would say from the time it begins to become dark, from dusk, until latest I've observed them would be 2:00 o'clock [sic], 2:30, 3:00 o'clock, possibly.

Q. Do you notice a lot of passers-by in that area at that time outside of those congregating? A. I would say there's a great deal of motor traffic on our street during those hours.

Q. What about pedestrians? A. There seems to be some migration of these individuals down the street, down Irving Place from the approximate location I've described before.

[R83]

Q. Basically those congregating or other people just passing by? A. There's a certain amount of congregation, generally it's a quiet street. But during the summer months there is a noticeable increase of automobile traffic, there's automobile traffic late at night, idling automobiles on the street, as well as through traffic.

Q. As a resident of Irving Place are you at all apprehensive about you or your family walking down the street at the times when these people may be congregating?

MR. GARDNER: Objection. Irrelevant, leading.

THE COURT: Do you want to be more precise.

MR. GARDNER: Well, he's asking him if he's apprehensive about living in the neighborhood apart from my general objection as irrelevant to the motion.

THE COURT: I understand.

MR. GARDNER: It seems it's a leading question and I don't think it's relevant to even the testimony the witness has given. It's one thing to ask this witness to describe what he sees, it's another thing to ask a witness to describe what he feels inside himself, that goes into the mental make-up of the witness which I can't possibly

[R84]

cross examine. How do you feel, what do you think at the time, things of that sort are not normally admissible.

THE COURT: Sustained.

MR. LOKKEN: Well, Your Honor, part of the People's argument is that the sort of congregating prohibits the free flow of traffic in the area.

THE COURT: Ask if he goes out during those hours.

BY MR. LOKKEN:

Q. Do you go out during those hours, Mr. McCarthy? A. Occasionally.

Q. Does your family? A. Yes.

Q. Do they pass by these groups? A. Yes.

Q. And have you had any encounters with them? A. I've not conversed with them.

Q. What kind of encounters other than that have you had? A. Primarily passing location where they congregate.

Q. Have they addressed you in any form? A. Not that I'm aware of.

Q. Has anybody in your neighborhood described to you any kinds

[R85]

of problems they may have had? A. Primarily the conversations.

MR. GARDNER: Objection. I think it calls for a yes or no and I will object on the basis of hearsay to any relations.

THE COURT: Yes or no?

THE WITNESS: Yes.

MR. LOKKEN: And you can generalize what sort of complaints they may have voiced to you?

MR. GARDNER: I'll object on the basis of hearsay, Your Honor.

THE COURT: Sustained.

MR. LOKKEN: Nothing further.

THE COURT: Mr. Gardner?

CROSS EXAMINATION BY MR. GARDNER:

Q. On these occasions, Mr. McCarthy, when you have gone out have — and these people have been on the street, have they impeded your ability to come and go as you wished? A. Physically impeded?

Q. In any way you want to describe it? A. I would say impeded from my reluctance to go out, psychologically.

[R86]

Q. Well, before we get to that, when you have gone out and you've walked up and down the street, have you ever had any problem going past these people, going from where you wanted to go; have you ever been annoyed, harassed, by them in any way? A. No. Not overtly.

Q. Have you covertly been annoyed, harassed in some way? A. Well, I can respond that I haven't been physically intimidated as opposed to feeling some apprehension.

Q. Is it fair to say to the extent that there has been any inconvenience occasioned by these people being on the streets, it has been something which you have perceived as a result of your own instant thought rather than something that you have overtly done? A. No. I think the vehicle traffic, the idling automobiles on the street late at night, the ability to hear conversations going on outside the house, that has been an inconvenience.

Q. But you said that you have been apprehensive and you were psychologically inconvenienced, has anything been done to do this or is this a relation of your own feelings has anything been done by them to occasion this or is this your reaction to their presence?

[R87]

A. No. It's my reaction to walking by six or seven fellows congregating on the street corner.

Q. Now, Irving Place runs, as I recall, between North Street on the north end of the street and Allen on the south?
A. That's correct.

Q. And that's a one block street. Is that correct? A. That's correct.

Q. And Allen Street — and this is in the area between Delaware and Elmwood? A. That's correct.

Q. And Allen Street of course, if [sic] part of what we think of as Allentown? A. I believe it's referred to that way.

Q. Is it fair to say that in the summertime the entire area of Allentown is somewhat more active in terms of people being on the streets and present at night then would be the case in the winter, fall and spring? A. I think that's a fair description.

Q. Is it also fair to say, sir, that Allentown in comparison with most other areas of the city, as a matter of fact, is somewhat more populated with people on the street and with bars and restaurants and night life activity than various other parts of the city?

[R88]

A. Maybe some parts of Allentown are but I wouldn't say where we are.

Q. I'm not talking about Irving, per se, but take Allen Street at the foot of Irving, for example; that's a fairly active area in the summertime at night, isn't it? A. I suppose you could characterize it as such.

Q. Would it be fair to say that Allentown or the Allen Street area itself particularly is perhaps Buffalo's version of Greenwich Village in the summertime in terms of sociological activities?

MR. LOKKEN: I'll object to the grossness of that generalization he's called an answer for.

THE COURT: Overruled. Can you answer?

THE WITNESS: I've been to Greenwich Village, I assume it might be something like Allentown.

BY MR. GARDNER:

Q. You would consider particularly in the warmer months Allentown to be a fairly wide area of the city in terms of street activity. Isn't that right? A. I would say Allen Street.

Q. And the people on Allen Street that contribute to the aliveness aspect that you and I are talking about encompass

[R89]

a lot more people than either prostitutes or homosexuals, as far as you can see. Is that correct? A. Being a resident, I would assume so.

Q. So when you refer to Irving Street as a generally quiet street, you would have to qualify that by saying that it's very close to Allen Street which is a fairly non-quiet street. Isn't that correct? A. Irving Place is quiet primarily because it's directed toward Allen Street but I believe there's more activity down Elmwood into Allen and down Wadsworth into Allen then there is down Irving to Allen because Irving is so close to the end of Irving from Delaware. From my living there it's quiet and that it has much less traffic than any other street that would flow into Allen Street. And, any spin-off or migration of activity from Allen Street I think is retarded by the fact that Irving goes the other way.

Q. It's a one way street? A. Going towards Allen so we get very little traffic, even pedestrian traffic from Allen towards North.

Q. If you had either vehicle pedestrian traffic who were involved in the night-life or live activity of Allen Street and were going to Allen Street, it would not be unusual that they might take a one way street down Irving to get to Allen

[R90]

which is right at the foot of the street? A. No, I'm sure that must happen.

MR. GARDNER: Nothing further.

THE COURT: Anything else?

MR. LOKKEN: Nothing further.

BY THE COURT:

Q. Mr. McCarthy, are there women with these men? A. Not that I've observed.

Q. No women? A. No, sir.

Q. Are these teen gangs or youthful gangs? A. On some occasions their presence seems to be solitary, they may be standing there alone, there may be three of them standing together, there is a bench on North Street very close to Delaware where there's generally a congregation of more than one. At the corner of Irving and North Street that generally is solitary individuals standing there, possibly twenty feet apart or so but there are no women.

Q. What age are these people? A. I would say from seventeen to thirty.

Q. They're not school kids hanging out on a corner, in other

[R91]

words? A. I don't really know, I can't characterize their age necessarily.

Q. Is this more on the weekend or more on the week days?
A. It's generally more on the weekend, I believe, and it's generally more than in the summer.

Q. Now, you're married, are you? A. I am.

Q. Do you have children? A. No.

Q. Are there other families in the neighborhood on your block? A. There are a number of young families on the block with children.

Q. Well, you stated you were reluctant to go out. Why? A. There seems to be during the summer, a lot of activity up at that corner. For instance, at Irving and North there's men who are dressed casually who I don't believe live in the area and there have been, that I'm aware of, incidents in the neighborhood, burglaries, and fires, that type of thing. So, there's just a normal apprehension when passing an individual that I don't remember or not familiar with by virtue of his living in the neighborhood or he may appear to be unusual in his appearances at large, or dressed in a

[R92]

manner you might consider to be unusual, but there's an apprehension. Nonetheless, I'm aware of a certain amount of violence, muggings, but that occurs to neighbors.

Q. Are there gay bars in the area? A. I don't know. I think there's one on Allen Street. Your Honor, I don't know the sexual preference of these people, I can only describe what I've seen. I don't know whether they're male prostitutes or homosexuals or whatever, I think it's well known that there are a number of homosexuals living in Allentown which are home owners and keep their property in good repair and they are not a nuisance or a bother to the other residents on the street.

Q. From your observations, you say there are groups of men hanging around at least the corner of North and Allen and North and Delaware and this occurs at night for some period of time, usually on weekends in the summer? A. Yes, sir.

THE COURT: Anything else?

MR. GARDNER: Yes. Just a couple questions.

RE-CROSS EXAMINATION BY MR. GARDNER:

Q. The Court referred to the word "gangs". Is that a word you

[R93]

would use to describe these people you've referred to, Mr. McCarthy? A. No — I believe I'd use that word. I'd try to use a description, congregation I think.

Q. And would these be a congregation to your observation of people who might meet each other on the street and stop and talk and move on as opposed to people who came in a group and stayed in a group and left in a group or are there — A. I would not say — I would characterize the congregation as a casual meeting. There's a bench on North Street that I have sat on, that is the same bench that these congregations might use and cars have driven by that bench slowly and look at me and I've looked at them and I would not describe it as casual encounters. I've gone out and came back and an hour later the same people were on the bench and the same people were solitary figures at the end of the street, I would say by virtue of observing them at some time later in the evening that their presence there was not transient.

Q. But at the same time, Mr. McCarthy, I gather when you were sitting on that bench, if someone else came along and sat on that bench with you, Police Officers or others in the public who might interpret that the two of you were a congregation, a group, and the — both be homosexuals would

[R94]

probably be incorrect, is that fair to say? A. I think you're absolutely right, Mr. Gardner.

MR. GARDNER: Thank you.

THE COURT: Anything else?

MR. LOKKEN: No.

THE COURT: Will you wait a second while I take care of some other matters.

(WHEREUPON, COURT THEN STOOD IN RECESS.)

ROBERT FREUDENHEIM, 140 North Street, Hotel Lenox, Buffalo, New York, having been duly called and sworn as a witness on behalf of the People, was examined and testified as follows:

* * *

DIRECT EXAMINATION BY MR. LOKKEN:

Q. Mr. Freudenheim, you have an interest in the Hotel Lenox? A. Yes. I do.

Q. That's located on North Street in the City of Buffalo, is it not?

[R95]

A. Yes.

Q. Between Delaware and Elmwood? A. Yes. Specifically between Delaware —

Q. And Irving? A. — and Irving.

Q. Are you active at all in managing or overseeing this establishment? A. I am the owner of the hotel and I have a general manager that manages the hotel for me. I visit it two to three times a week.

Q. Have you as the owner received any complaints about any kind of loitering in that vicinity of 140 North Street?

A. I've received no specific complaints but innuendo, rumor, my own observations tell me that it is going on.

Q. What have been your observations? A. I have a tendency of visiting the hotel, since I have other means of employment

during the day, at night generally between 8:00 and 12:00 and I have seen groups of young men on both corners; the corner of Delaware and North, specifically near a couple of benches on the corner of Delaware and North and on the corner of Irving and North, generally a few feet down Irving.

Q. And what has been the behavior of these groups, if you can

[R96]

generalize them? A. They generally just stand there for periods of time.

Q. Have you seen them in contact with any passers-by, either in automobiles or pedestrians? A. Only one time I had occasion to mow the lawn on Irving, as a matter of fact, and there were — I was mowing the lawn, perhaps, thirty, forty, fifty feet down Irving and I received a complaint from an Irving resident as a matter of fact, so I took my lawn mower and did my own thing. So, at that time I noticed one or two people loitering and several cars stopping.

Q. And was there conversation? A. Conversation took place I believe, the cars went on after that.

Q. And was that the only instance of contact between the groups? A. Yes, that I can think of. Yes.

Q. Have you as owner of the hotel received complaints from any of your tenants? A. Not specifically. I've been talked to by my desk clerks and general manager has spoken to me. We have talked at one — we have an outside guard that constantly patrols the area, however, he does not go on the streets. Just patrols the hotel, it's [sic] parking lots and its two entrances

[R97]

and egresses and all that.

Q. What's been the nature of their comments? A. Just that was I aware that it seems to be — the momentum seems to be growing that young male adults seem to be gathering in both corners.

Q. Are there ever any women in those groups? A. No.

Q. Have any of the people who have reported to you on these incidents, have they mentioned anything else? A. No.

Q. How many people compose a group? A. I don't believe I've ever seen more than three or four. Generally two.

Q. How long are they there? A. Well, my check-ups or inspections of the hotel which again I do at night generally take an hour, I do a routine check and check the restaurants for cleanliness and things like that and I would say I'm in the hotel for a bit over an hour.

Q. Do you observe a group perhaps outside the hotel when you enter the hotel? A. I have frequently seen the same people there entering and when I go out, as when I leave.

[R98]

Q. And that may be for an hour? A. Yes.

Q. Have you noticed any encounters between pedestrians and these people? A. No.

MR. LOKKEN: No further questions.

CROSS EXAMINATION BY MR. GARDNER:

Q. Over what span of time, Mr. Freudenheim, would you say you've made these observations? A. I've owned the hotel

for just short of three years and although I used to be a resident of the area and I do drive down North Street on my way home, I live on the Westside and it seems to be getting quite worse. There seems to be more groups and, of course, the better the weather, the more the people, the more frequent the groups or the more I notice it full.

Q. In any event, you observed these kinds of groups over the last three years. Is that correct? A. Yes. I would say more so over the past year have I become aware of them.

Q. And would you say that part of the reason you've become

[R99]

aware of it more so, in the past year, has been that there's been discussion about it by you and your general manager? A. That's correct.

Q. And you've had this complaint by someone on Irving Street and you've paid more attention since you had that? A. I had a complaint about my lawn which prompted me to cut my grass. I've been sensitive to it because of conversations and obviously when you see groups of young males gathering there it's certainly a lot different than if it was a man and a woman. My residence is near some bars and you see a lot of young adults, male and female adults, it seems to be more male adults in that particular section.

Q. Let me ask you this. Has it been your observation that generally at that hour of the night these groups of people are reasonably quiet? A. Yes.

Q. So they haven't been out there throwing beer bottles or raising loud ruckus, noise? A. No, to the best of my knowledge when I'm on the premises.

Q. But you've been there three to four times a week over the last three years? A. Yes. Just short of three years.

Q. Is it fair to say that you would consider these gatherings

[R100]

of young males to be undesirable for your neighborhood?
A. Yes.

Q. Is it also fair to say you would consider it less undesirable if they were groups of males and females, mixed groups?
A. Yes. It would be.

Q. And would you explain to the Court why you would consider it less undesirable if you had males and females rather than just having males alone? A. I would be delighted. I suspect males and females — couples, if you will, wouldn't loiter on the corner of Delaware and North or North and Irving, especially for any length of time. There would be no reason to unless they were saying bye to each other, it's not — it's a residential district. Interesting enough, there's a lot more of elderly people living at the Lenox, the Ambassador, some of the houses around there, so these situations occur infrequently.

Q. In any event, I gather that you do not object to the fact that there are people on the street as such? A. That's correct.

Q. In fact, the presence of people on the street at late hours of the night may in fact make it safer to walk the streets because there will be people to observe when someone tries

[R101]

some criminal activity? A. I'm not quite sure I agree with that, not the young adults that I observe in that neighborhood.

Q. I understand. Let's get away from those young adults for the moment. A. Okay.

Q. If, for example, you had middle-aged couples composed of men and women walking up and down the street enjoying the night-time air, you would not consider that detrimental to the neighborhood? A. That's correct.

Q. And in that kind of situation as a matter of fact, those people on the street might make it a little more comfortable for you, elderly tenants to go out on the street and go to the corner?
A. That's a fair statement.

Q. In a choice, you would certainly rather have the streets used by respectable people in those hours of the night rather than having the streets empty and desolate so that if your tenants had to walk to the corner they would have to take their chances on what might happen? A. If they were as you described, middle or elderly aged couples you are correct.

[R102]

Q. Therefore, sir, is it fair to say that the nature of your concern — is it fair to say the nature of your concern that people who are making the street populated at that hour of the night are, number one, young males — A. Correct.

Q. — and number two, are as far as you know and believe, homosexuals? A. I suspect they are that.

Q. That's one of the factors? A. I'm sorry?

Q. That's one of the factors in your mind that makes them undesirable. Is that correct? A. That's correct.

Q. Have you ever observed in your observations of the street, any of these groups of people engaging in violent activities A. None.

Q. Have you ever observed any of these groups of people pressing themselves or imposing themselves on passers-by who apparently did not want to talk to them? A. No.

Q. When you have observed conversations and you mentioned on one occasion on Irving Street where one of these people would talk to someone in a car that would stop temporarily,

[R103]

the conversation was quiet and privately between the two people? A. That's correct. I was ten or fifteen feet away, I could not hear anything.

Q. And when the pedestrian participated in that conversation, they then stood up and walked away and the car drove on? A. That was the end.

Q. There was no problem at all? A. That's correct.

Q. You say you've had no specific complaints from the residents of the hotel about this situation? A. Not to me personally.

Q. Well, have you had reports and I'll violate my rules a little bit on hearsay, have you had reports from your general manager about complaints he's received? A. I would have to answer that I believe so. I believe that's what prompted his conversation with me.

Q. Well, did he tell you he had received any complaints? A. I don't remember that specifically. I don't remember that.

Q. So, as far as you know, his conversation with you may have been prompted by his own observations. Is that correct? A. By his own observations because he lives in the hotel or by complaints he may have received.

[R104]

Q. Or perhaps by something that the outside guard mentioned? A. Or the other sixty or seventy employees.

Q. We simply don't know, is that a fair statement? A. That's correct.

MR. GARDNER: Thank you very much. Nothing further.

MR. LOKKEN: Nothing further.

THE COURT: Let me ask a few questions.

BY THE COURT:

Q. Whatever the situation is, it hasn't affected your business? A. I hope it hasn't, I don't know that. I don't know that.

Q. You're still fully occupied? A. The occupancy is very high, it's not full.

Q. But it hasn't changed? A. No.

Q. Not substantially over a period of time in the last three years? It has remained pretty steady? A. Yes.

Q. So other than the fact that you find these people distasteful and you don't like them around, they're not affecting your business or anybody else's business? A. To the best of my knowledge, they are not. I would have to

[R105]

question whether my middle-aged to elderly tenants want to walk to Howard Johnson's or to Allen Street or whatever and be faced with young men. Again, I have to question that.

Q. So you're really dealing with attitudes and nothing that you can really put your finger on about them being violent? A. That's correct.

THE COURT: Anything else?

MR. LOKKEN: Just one or two other questions.

RE-DIRECT EXAMINATION BY MR. LOKKEN:

Q. Mr. Freudenheim, are any of your apartments rented to people with families? A. No. Just couples.

Q. Were you to rent them to couples with children, would you advise them of the situation on North Street that we

discussed here? A. Being a business man — well, first of all, I have nothing to do with the operation of the hotel, I would question whether that is mentioned. I'm not sure we even have families other than our transient business where we have many families that stay one or two nights. I'm not aware of any permanent families even applying there.

[R106]

Q. Do you expect that perhaps were you to engage in perhaps renting rooms to families with children, that this — the situation on North Street might affect that? A. I guess I'd have to use the words it could.

MR. LOKKEN: Nothing further.

THE COURT: Thank you.

MR. GARDNER: Nothing further.

COUNCILMAN WILLIAM MARCY, residing at 90 Dana Road, Buffalo, New York, having been duly called and sworn as a witness on behalf of the People, was examined and testified as follows:

DIRECT EXAMINATION BY MR. LOKKEN:

Q. Sir, you're a member of the Common Council of the City of Buffalo, are you not? A. Yes. I am.

Q. And what are the bounds of your district? A. It's a very large district, it starts at —

Q. Rather than have you go through that, does it include the Allentown area? A. Yes.

[R107]

Q. Does it include North Street? A. Yes. It does.

Q. You've listened to this testimony? A. I've heard some of it, yes.

Q. Have you had — you or your office received any complaints about activities regarding loitering by people who are trying to engage in this kind of homosexual encounter? A. Yes.

Q. And could you describe the nature of these and where these specific areas — where these might be pointed to? A. You've been referring to North Street and the general complaints are North Street run between Delaware and Elmwood Avenue and they occur on the four corners; Delaware Irving Park and Elmwood. We get most of our complaints — most of our complaints have been during the warmer months, that doesn't mean to say that there not at other times of the year and they come at the rate of maybe two or three a week.

Q. And what are the natures of these complaints? A. Generally speaking it will happen after the fact. We'll get the complaint the next day from a constituent or somebody that's been in the neighborhood at some time or another and was either accosted or seemed to see what they

[R108]

considered obvious solicitation for whatever purpose, I assume the purpose of sex.

Q. Has there been activity of homosexual encounters as well as female prostitutes? A. Yes. In the case of North Street as opposed to complaints we get on Allen Street, North Street seems to be mostly homosexual activity.

Q. Could you generalize as to the type of encounters or the types of encounters that have been complained about? A. I'll try to generalize because each one seems to be a little bit different. For instance, the people at the bus corner on Delaware and North have been confronted by somebody of the same sex, generally male, as a matter of fact, all of these complaints are male homosexuals or they have been asked do you want to have a sex act, sexual act and these are usually people who live in the neighborhood or close to that corner; at the Lenox, Westbury,

Mayfair Lane. I think maybe I should continue and finish because the same problems go all the way down the street. As I said they're at all four corners of that block in that area between Elmwood and Delaware. And the other complaints are also in the nature of people who live there and see more than one person together — more than

[R109]

one person congregating, maybe two or three people of the same sex congregating at a corner and they've reported it to me or to my office that they consider this a somewhat frightening I guess is the wrong word to use, very unpleasant situation for them; and, of course, they always report it as taxpayers.

Q. Are most of the calls anonymous or do they leave their names? A. I know most of them — they generally leave their names.

Q. And as far as you can tell from these complaints, would it be fair to say that contact wasn't initiated at all by the complainant? A. To the best of my knowledge — you mean between the people on the street?

Q. Yes. A. No. Never.

Q. So in most of these cases, there has been an approach by the other party? A. Yes.

Q. For whatever reason? A. Yes.

Q. Have you yourself had any experience in the North Street area that may reflect on this?

[R110]

A. Well, my son goes to a tutor on Irving Place — as a matter of fact, she lives next door to Mr. McCarthy who was here previously — for math. And he's been doing this for a couple of years and looks like he'll be doing it for the conceivable future. At any rate, I pick him up generally in the afternoon

around 5:00 o'clock, 5:15, and one day I did go to pick my son up —

MR. GARDNER: I'm sorry?

THE WITNESS: I'm trying to explain the circumstances.

MR. GARDNER: I can't hear and I'd like to be able to make a timely objection so I would ask that the witness speak more slowly and clearer.

THE WITNESS: My son was going to a tutor, I went to pick him up at 5:00 o'clock in the afternoon, it may have been a few minutes earlier. Parking is difficult on Irving Street, it's a narrow street so I parked closer to North Street waiting for him to come from the tutor's house. I was in my car and I was approached by another young male who came to the car and asked me if I would like to engage in sex with him and I asked him to go away and leave the neighborhood. He swore at me and left, went back to North Street and

[R111]

disappeared around the corner.

BY MR. LOKKEN:

Q. He was in an automobile? A. No. He was walking, I was in my car.

Q. Were there any other young males there? A. No. He was alone.

Q. What did you do when you have these complaints, do you report them to any police officials? A. Yes, I do. I report them directly to Commissioner Cunningham, occasionally I point them out to Captain Kennedy.

Q. Has the frequency of the complaints varied with the seasons? A. Yes.

Q. And if you're able to tell, have they varied over the course of the last few years? A. I've been councilman for almost four

years and it tends to come and go. I can't say. For instance, last year we didn't have quite as a heavy a problem with prostitution as we seem to have in the past three or four months. Then, again, two years ago we had a large problem and it was in a different area then you're talking

[R112]

about but it was still a prostitution problem.

Q. To clarify matters a bit, the complaints that have been directed to your office, have they involved offers for we'll say deviate sexual relations, have they been complaints regarding offers for money or not for money or a combination of both. What I'm trying to say, has there been prostitution involved in the homosexual encounters? A. Oh, indeed. I can't say every complaint has mentioned that they would ask for money to do sex with somebody or something like that.

Q. But it was part of both? A. Yes.

MR. LOKKEN: Nothing further.

THE COURT: Mr. Gardner?

CROSS EXAMINATION BY MR. GARDNER:

Q. With regards to the complaints you received from people who have been approached, councilman, as part of those I gather they indicated some money connection with the conversation. Is that correct? A. In most cases, yes, that is reported directly to me.

Q. How many of these complaints would you say you've received

[R113]

in the last year relating now to the North Street area for the moment? A. I'm going to say twenty, I would think, over a period of a year. I can't say for a year because it drops down,

say, the first of November you won't get that many complaints. So, since the snow left, since the first of April, maybe fifteen to twenty.

Q. And of those fifteen to twenty, how many times did a person complain to you specifically that there was money in the conversation? A. Well number one, Mr. Gardner, I don't take all the calls directly. When I do talk to them and I would say I've personally discussed this with maybe six or seven people, they've all said it was for money.

Q. And those were all situations where they had been approached directly? A. That's correct.

Q. Now, taking the situation where you've received complaints by people who have merely observed people on the street, is it fair to say that they were not in a position to know whether or not there was money involved in the situation? A. That's fair.

THE COURT: We'll take a brief break.

[R114]

(WHEREUPON, COURT THEN STOOD IN RECESS.)

THE COURT: Yes, Mr. Gardner.

BY MR. GARDNER:

Q. Mr. Marcy, on the incident when you were approached, was there any mention of money at that time? A. Yes. There was.

Q. And what was said by the young man with regard to that that you were talking to? A. Do I have to repeat the exact words?

THE COURT: Do you want the vernacular?

MR. GARDNER: No. What did he say about the money specifically?

THE WITNESS: He said for \$10.00 he would perform a certain act.

BY MR. GARDNER:

Q. In other words, he offered to do something for \$10.00?

A. That's correct.

Q. Now, you have had occasion to be acquainted with homosexuals in the course of your career or your lifetime, Mr. Marcy? A. To know them?

[R115]

Q. Yes, as people? A. Certainly.

Q. And you're not suggesting in your testimony that all of the activity of homosexuals on the street talking to each other is necessarily prostitution? A. Good heavens, no.

Q. I just wanted to be clear on that.

MR. GARDNER: I have no further questions.

THE COURT: Mr. Lokken?

MR. LOKKEN: No further questions.

BY THE COURT:

Q. From what I've heard you're the only one to testify that you were affected and you don't live in the area. You live on Dana which is not directly in the area? A. It's a long ways away. I think perhaps the occasion was that I was sitting in the car waiting for my son.

Q. When Mr. Gardner mentioned the fact that you've had occasion to know homosexuals in your life, you don't claim — I gather you're not here subpoenaed but you're here because you're interested in your prosecution as a witness?

[R116]

A. Yes, sir.

Q. Do you claim that this sort of street life is necessary for a homosexual to carry on his own life; in other words, this kind of street encounters are a necessary part of a homosexual's life?

A. Prostitution — and I assume prostitution means there's being exchanged for certain acts, whether it's female or male prostitution, I don't think is important at that point. Business men who operate what we normally think of as a normal business, a store, they have to live within a certain boundary of the Zoning Laws and the Business Laws and one thing or another and these people do not. I don't think that it is necessary for a homosexual to have to go and sell his body or a female prostitute to sell her body in order to make a living.

Q. Or to go to one who is selling? A. That's correct. Or to go to one who is selling. I think it's an obnoxious situation and I'm not being facetious, I say it all the time, it may sound that way.

Q. If you were to legalize prostitution, male and/or female in the special zoning that's created on Elmwood Avenue, for instance, on Allen Street, you could prosecute these people under the Zoning Law because they would be

[R117]

specifically either prohibited from doing this or it would not be included in the Special Zoning District. Does that make some sense to you? A. I undersand what you're saying.

Q. I gather some of your complaints is [sic] that these people were soliciting one another or soliciting complainants who would call you? A. Yes. I would assume that's the case.

Q. Without asking for money or without offering to do it for money? A. I think the idea is that money was implicit, but whether it was mentioned or not, I couldn't say in every instance.

Q. So your complainants are sort of tied up with the idea of male prostitution? A. That's correct.

THE COURT: Perhaps you want to ask questions on that, Mr. Gardner?

MR. GARDNER: I do.

RE-CROSS EXAMINATION BY MR. GARDNER:

Q. Have you ever been occasioned to read any authoritative

[R118]

books or anything on sociology or any other aspects of homosexuality?

MR. LOKKEN: I'll object to this.

THE COURT: Overruled.

THE WITNESS: I don't know what you mean by authoritative books. I read extensively, I suppose whether I've read authoritative books, I don't know, I may have in college.

BY MR. GARDNER:

Q. Have you? A. Medical books.

Q. Have you read anything on the subject of homosexuals and how they interact with each other socially or otherwise?

A. Most of it has been in novel form.

Q. The complaints you've received, you just testified, you thought implicitly involved the subject of money. Would you agree that it's unlikely that if a homosexual was on the street and met another homosexual it's unlikely that either one of them would call you to make a complaint? A. Obviously they would not.

Q. And you made a fairly strong statement, I thought, that it ought not to be necessary for these people to engage in

[R119]

these situations on the street for money. Do you know what one gay person does to learn who is another gay person or to meet him, are there any places in your district, to your knowledge, where that can occur other than on the street? A. I'm told there are certain gay bars, restaurants, taverns, what have you in my district.

Q. Is it your opinion or feeling that if there are homosexuals in your district, if they went to meet each other they should go to gay bars or these types of establishments as opposed to encountering each other in some public place other than gay bars? A. I think it would be more equitable of a situation for the residents and the business men of the area, yes.

Q. Were you here when Mr. Fruedenheim testified, correct?
A. Yes. Well, for part of it.

Q. I asked him at that time if Allentown was a fairly active area in the summer months with people out on the street walking and talking to each other. Is that your observation of Allentown, generally? A. I think that's true.

Q. And you have no objection to the fact that there are people who find it safe to use the streets in Allentown at night

[R120]

without fear, if that's the case, let me rephrase my question. You have no objection, do you, sir, to the fact that there are people out on the street in Allentown in the warmer months?
A. Good heavens, no.

Q. Would it be fair to say that you would think it better for the neighborhood if the homosexuals would go somewhere else? A. You're using a very strong term.

Q. Homosexuals? A. You're using general terms.

THE COURT: Just a moment. You're talking about the streets?

THE WITNESS: I'm talking of prostitutes. I'm not talking about homosexuals per se.

BY MR. GARDNER:

Q. This case, as far as I know, is not about prostitutes and that's what I'm getting to. Your testimony, is it fair to say, sir, is related to problems regarding prostitutes? A. That's correct.

Q. And you're not giving any opinion or expressing any finding with regard to complaints about homosexuals who are not

[R121]

engaged in prostitution but merely want to meet each other?

A. That's not the subject here and I have no [sic] and I certainly did not intend to give any such testimony.

MR. GARDNER: Thank you very much.

THE COURT: Anything else?

RE-DIRECT EXAMINATION BY MR. LOKKEN:

Q. Sir, that encounter that you have described with a person who offered sex for a fee — A. Yes.

Q. — would you have been less offended if it had been an offer to do it for nothing? A. No. I would have just been offended.

MR. LOKKEN: Thank you.

RE-CROSS EXAMINATION BY MR. GARDNER:

Q. Sir, if your wife had been approached by the same gentleman as she was waiting for your son, and had been asked if she would like to engage in sex without a fee, would she have been equally offended so far as you know? A. I think she would have been, yes.

[R122]

THE COURT: Okay, that's it.

(WHEREUPON, A BRIEF RECESS WAS THEN TAKEN.)

KENNETH BURGSTAHLER, 74 Franklin Street, Buffalo, New York, having been duly called and sworn as a witness on behalf of the People, was examined and testified as follows:

DIRECT EXAMINATION BY MR. LOKKEN:

Q. Officer, how long have you been employed by the Buffalo Police Department? A. About fifteen and a half years.

Q. What is your current assignment? A. I'm assigned to the Vice Squad.

Q. How long have you been there? A. About fifteen years.

Q. Have you had occasion to make arrests for loitering for the purpose of engaging in deviate sexual activity before? A. Yes. I have.

Q. And have you had any idea how many such arrests you may have made?

[R123]

A. Well, I don't have any specific numbers but I've made quite a few.

Q. Do you, yourself, often receive complaints about such activities? A. Well, if we happen to be in the office at the time and somebody calls in, yes, otherwise whoever is in the office, the desk man, whoever is there will take the complaint and enter it in our complaint log and whoever comes in when working nights or days will read this over and see what complaints have been received and what we'll work on.

Q. So, if you've received some complaints to respond to a particular area where the complaints have been issued from you will respond? A. Yes.

Q. Can you describe in general terms the nature of your encounters on the street with people whom you've arrested for this crime? A. For the loitering?

Q. Yes. A. Well mainly we use them a lot to arrest homosexuals, homosexual persons who have committed deviate acts with no fee involved. Recently we have used it with a male

[R124]

and female for prostitution.

Q. If you can generalize, officer, do these arrests occur — are there other people around outside of you and the person who you eventually take into custody; in other words, do these kinds of encounters often take place in groups of people or where there are people mulling about or relatively a solitary isolated kind of happenstance? A. Well, usually the arrest will take place with just two people; the officer and another party, but I'm not saying that there are not other people in the areas where we are.

Q. Have you seen people who you've arrested or people who have been mulling about confront other people, other than yourself? A. Yes.

Q. Could you generalize as to what happens when these confrontations took place?

MR. GARDNER: I'm sorry, I'll object to the form of the question. I don't know what's meant by confrontations.

THE COURT: Sustained. What was the question again?

BY MR. LOKKEN:

[R125]

Q. What are the natures of the encounters between you, the people you arrest and the people mulling about and other citizens walking by. Have you been able to tiplify [sic] those at all? A. Well, I can testify to what would go on between — if I had a conversation with somebody or one of the other officers I

work with had a conversation and there was an arrest and — but to say what went on between other parties in the area would be hard to say.

Q. Did you know that there is a lot of what you might call hanging around in the areas where you've received complaints, are there a lot of young males for example in the vicinity? A. Yes. There are.

Q. Are there other kinds of people, older people, young people, children, adults, families in that vicinity? A. Well, it depends on what area we're talking about.

Q. Are you familiar with the North Street area? A. Yes. Very familiar.

Q. At the end of Delaware? A. Yes.

Q. What kind of groups congregate there as far as you receiving complaints about loitering?

[R126]

A. Well, there's a lot of males hanging around on North Street and it varies in age from young to old. There are other people in this area that walk through the area, there is a hotel right around the corner, there's Howard Johnsons, there's a lot of people in this area.

Q. Do you see any interaction between these young groups of people hanging around and the other people you've mentioned? A. Well, I seen conversations. I've seen vehicles stop and talk to these people; one would get in, one would leave.

Q. Now, as far as your arrests go, who approaches whom? A. In our case the person arrested would approach the officer we try not to approach anybody, we are in the area but we try not to approach anybody.

Q. And are these conversations between yourself and these people, do they tend to be long and involved or rather abrupt?

A. It goes both ways. Sometimes they're long, sometimes they're very short, it just depends. Sometimes there's a conversation with no arrests, there's no talk of any type of sex and there might be no arrest.

Q. Are the inquiries for sex made initially or are they made somewhat after the conversation has developed?

[R127]

A. Usually after the conversation started.

Q. And how are the approaches made, is there a topic of conversation brought up or would you typify [sic] or generalize as to what kind of advances are made toward you? A. Well, they usually ask you if you want to engage in some type of sex.

Q. What might be the initial question? A. Well, they sort of say, hey, are you looking for a good time, what would you like to do. And then it goes back, what would you like to do, and then it usually comes out what they want to do and you usually agree and then you agree on some place to go and then the arrest is made.

Q. Do these arrests, the ones you've made, do they tend to be concentrated in a few areas or are they evenly disbursed? [sic] A. No. There are a few areas —

THE COURT: Could I interject. When you walk up to groups on North Street, do you try to walk through, what happens?

THE WITNESS: We're usually in the area.

THE COURT: Are you observing or what?

THE WITNESS: We're observing.

THE COURT: You're in a car?

THE WITNESS: No. Usually on foot — well, we drive through

[R128]

the area, yes. A lot of times on foot.

THE COURT: There's a Hotel Lenox and across the street there's a stone wall with a big vacant lot, that's where the house got knocked down?

THE WITNESS: That's right and they sit on that wall, they walk into the back lot, they hang on street corners so we either walk through the area and stay in them areas or we might be on the street corner.

THE COURT: When you walk through a group of people wherever they are, have you ever known yourself as you walked through these groups of people, that you're stopped?

THE WITNESS: I can't say I was stopped by a group of people, no.

THE COURT: So, in other words, you're walking through, you're about the same age more or less?

THE WITNESS: Well, some of them are younger.

THE COURT: And nobody stops you though usually you have to stop before there's any kind of talk?

THE WITNESS: Not necessarily. I'm talking about a group, they may not stop you in a group. If there's one or two they might say how are you.

[R129]

THE COURT: Well initiate it, does that happen also?

THE WITNESS: It happens quite a bit, yes.

THE COURT: Would you say it happens half the time, more of the time or less?

THE WITNESS: A little bit less than half.

THE COURT: Less than half. In the other — in other words, the majority of the time you have to initiate something, you have to stop?

THE WITNESS: Well, we're in the area —

THE COURT: But if you're walking through less than half the time does somebody say hello or something, is there anything you deem offensive?

THE WITNESS: Well, not myself, I'm —

THE COURT: I know, you've been through it. What was the worst they say or the typical thing if you're stopped?

THE WITNESS: They usually won't say anything right away.

THE COURT: Will it be hi?

THE WITNESS: Hi.

THE COURT: And an invitation but nothing offensive?

THE WITNESS: That's correct.

THE COURT: Very rarely do you get something obscene or anything like that.

[R130]

THE WITNESS: That's true.

THE COURT: Okay.

BY MR. LOKKEN:

Q. Officer, how long does it take to the end of the conversation before the subject of sexual activities is brought up?

A. It's hard to answer, it varies.

Q. Do you exchange two or three sentences generally or would it be a half hour's conversation? A. No. It's usually less than that. I'd say an average of maybe ten minutes.

THE COURT: That's the average, in other words, to talk with these fellows before anything happens is ten minutes?

THE WITNESS: Well, sometimes it's quick.

THE COURT: Quick?

THE WITNESS: Real quick and other times it's longer and it's hard to generalize how fast it happens.

BY THE COURT:

Q. Are these the guys that hang out on the corner?

[R131]

A. Delaware and North they usually hang out, yes.

Q. They go for the cars and the cars flow through there and they stop? A. Yes. They do.

Q. That's at this point when sometimes people are on foot and they go someplace? A. Yes.

Q. It happens? A. Yes. It does.

Q. Do you have — did you ever use a decoy or anything other, any other system to go after prostitutes as opposed to fellows? A. Yes. We do. We use private cars, unmarked cars and pull up there and get solicited that way.

Q. You do? A. Yes.

Q. So there is a way you go after prostitutes? A. Yes.

Q. So that is done? A. Yes.

Q. As opposed to what goes on, you also do this on Washington Street and areas like that? A. Yes. We do.

[R132]

Q. Would you characterize the activity in the Elm-Oak area more serious and more violent than North Street? A. Well, in terms of violence probably, yes.

Q. You've had murders down on Elm-Oak involving prostitutes, kids ripping off prostitutes, this sort of thing? A. Yes. We have.

Q. But have you ever had anything like that, the same kind of robbery, the same kind of intensity, violence, on North Street? A. I wouldn't say intensity but I wouldn't say it hasn't happened.

Q. But you do get complaints of robbery and violence? A. Yes.

Q. And this generally involves prostitutes? A. Usually, yes. Usually the younger type of homosexual will prostitute himself. An older one, they will want to meet somebody, usually.

Q. Have you found you can actually go after the prostitutes without affecting — in other words, do the prostitutes mingle with the other fellows? A. Yes. They do.

Q. So you don't know who's who? A. No. We don't.

[R133]

Q. So you will find young prostitutes on that same street corner along with fellows just out for a good time trying to meet another friend? A. Yes. We do.

Q. And you also try to arrest female prostitutes, correct? A. Yes.

Q. And you, yourself, do that? A. Yes.

Q. And you find there's quite an intensity, am I correct, on the violence attached to female prostitution? A. Well, I make a

lot more prostitution arrests than I have in loitering underneath loitering sex.

Q. Is there violence attached to prostitution or regular street crimes that you would expect occurring along with female prostitution. In other words, would female prostitutes also be very likely to commit street crimes from your experience, fifteen years or whatever it is? A. Yes. They would.

THE COURT: All right, that's all.

MR. LOKKEN: I don't have anything further.

THE COURT: Mr. Gardner — if I may. Are you aware of any kind of problems at the Front Park or LaSalle Park?

[R134]

THE WITNESS: Yes. I am.

THE COURT: This is dealing with homosexual activity?

THE WITNESS: That's true.

THE COURT: What sort of activities there?

THE WITNESS: Well it's mainly where two males will get together and have a conversation and usually right there some act is performed, it's usually in the bushes off the one side at LaSalle Park.

THE COURT: Do you get complaints about this?

THE WITNESS: Yes.

THE COURT: From who?

THE WITNESS: People in the area.

THE COURT: This is LaSalle Park?

THE WITNESS: LaSalle Park because there's a men's room on one side of the street and right across the street there's some bushes.

THE COURT: Describe the park?

THE WITNESS: Well, there's a U-shaped street —

THE COURT: Who's in the park other than homosexuals that you say are there?

THE WITNESS: Families, just about anybody, runners, ball players.

THE COURT: Do you have a little league there?

[R135]

THE WITNESS: I don't know to tell you the truth.

THE COURT: You don't know if there's baseball or football for kids?

THE WITNESS: Oh, wait. There is a football field off to one side, yes, there is for young people.

BY THE COURT:

Q. Do you customarily find families there? A. During summer, sure, a lot of people.

Q. When is there homosexual activity that you've seen or had complaints of, what time of the year? A. Well, in the summer months.

Q. Is this contemporaneous, does this happen at the same time that you have found families use it? A. Yes.

Q. Who complains of this? A. People in the park. See, in one area it's very desolate and dumped with garbage on one side, but if children get down in there they could see an act going on which isn't right and receive complaints that they are down in this area.

Q. In other words, some people, families, whoever, see them

[R136]

there? A. That's true.

Q. Do you know where the actual solicitation takes place?

A. Usually down in that area but I've also seen it in cars along the street on one side, not near the lake, on the other side.

Q. Is there an isolated area or are there people in the area?

A. In that area it's a little bit on the isolated side because it's over-grown with trees but there is [sic] all kinds of paths through there. It's not a clear area, not a motor area, it doesn't have any playground equipment or anything like that.

Q. So, you don't know if there's children in there or people there at all? A. If anybody wants to go down there, they can go down there.

THE COURT: All right, thank you. Mr. Gardner?

CROSS EXAMINATION BY MR. GARDNER:

Q. Officer, just on this last point, is there a time of day when that kind of activity in LaSalle Park takes place and I'm talking about homosexual activity, the open sex?

[R137]

A. I would say more in the afternoon.

Q. But in any event, we're talking about people who have decided to engage in sex in a public place, is that correct, in that instance? A. Yes.

Q. Have you been instructed that you have means to arrest those people for public lewdness in those situations? A. Well, I have never arrested anybody for public lewdness, usually solicitation would take place then and an arrest would be made in that area.

Q. I understand. But have you been advised and do you understand that there is a Public Lewdness Statute and if you

were to actually catch somebody in the act of sex you can arrest them under that statute? A. Yes. I'm aware of that.

Q. And, by the way, LaSalle Park, just for the record as to the geography, the LaSalle Park is near the Niagara River and it's well away from the area we've been referring to as Allentown area? A. That's correct.

Q. And His Honor referred to Elm-Oak area, am I stating that's an area of the city on the other side of Main Street from what we've been referring to as the Allentown

[R138]

area and removed some distance from the Allentown area? A. Yes. That's true.

Q. Now you were questioned with respect to the amount of time it takes on an average or in general before the subject of sex gets into the conversation. Do you recall that? A. Yes.

Q. Let me ask you, have you had experience in which you've been in a cruiser or an unmarked car cruising the street to see if you would be solicited and have you been solicited by male homosexuals for money, male prostitutes? A. I have been. I can't recall an instance in that area right now where I have been.

Q. Is it fair to say —

THE COURT: What area are we talking about?

MR. GARDNER: North Street.

THE WITNESS: North Street now.

BY MR. GARDNER:

Q. Is it fair to say, officer, that if you're a car and the car is approached by a male prostitute, the subject of getting into sex is going to come up very quickly? A. Yes. It usually does.

Q. As matter of fact, as a practical matter, it would be in

[R139]

first sentence, do you want to have sex for so much money, isn't that the case? A. That could be the case at times.

Q. Now, you also mentioned in your testimony however, and you referred to them as the older ones, generally that there were gay people or homosexual people on the street who were out looking for friends or looking for a good time who are not necessarily engaged in prostitution, is that correct? A. That's the way I feel about it, yes.

Q. Have you had occasion dealing with the people who you would — you think would fall under this category, you or an undercover officer? A. Yes.

Q. Can you tell the Court in those kinds of situations what the pattern is as to how long it tends to take before someone brings a subject of participating in sex up? A. (No response.)

Q. Is it longer or faster than it would be with prostitutes? A. Longer.

Q. Is it fair to say, officer, that if you're walking down North Street and you encountered an adult male who was looking for a friend to have some fun with and wanted that

[R140]

person to go back to his apartment with him, that a conversation would start with an innocuous conversation with hi, how are you, nice weather, that type of thing — A. That's true.

Q. And only if you stopped and engaged in that conversation for some period of time would the subject of possible engagement of sex be mentioned implicitly? A. Yes. That's usually what would take place.

Q. Now, in your job and the job your fellow officers undertake, is it true, sir, that you or your fellow officers would never be the first one to mention getting into actual sex with someone? A. That's true.

Q. And in fact, that, is it not, a standard procedure that you would follow, let the other guy mention sex for the first time. Isn't that right? A. That's right.

Q. And is it fair to say that before the other guy will mention sex for the first time there is liable to be a lot of conversation going on where he's feeling you out to see whether you might be interested in that and so on before he would actually take that big step, isn't that a fair statement?

[R141]

A. I suppose that's true.

Q. So if you walk up to such a person as this and they said, hi, how are you, and you said, I'm fine thank you, goodnight and you walked right on by, the subject of sex would never be brought up between the two of you, would it? A. With that type of person, no.

Q. So the only type of person where the subject of sex would be mentioned initially and before you had a chance to walk on by would be if you had an actual prostitute soliciting your business. Isn't that right? A. That's a true statement.

THE COURT: So you're only stopped by an actual prostitute, really?

THE WITNESS: Except in extraordinary circumstances. Most of the time if you're stopped by an actual prostitute —

BY MR. GARDNER:

Q. Stopped as the actual statement of sex? A. Yes. Right away, yes.

Q. And when you say you're stopped by other people, what you mean by that is they will initiate a conversation? A. Like, hello, how are you.

[R142]

Q. And you have the choice to stop and talk to them and say hi and walk on but they don't physically stop you? A. No. They don't.

Q. Now you mentioned in your testimony that by the time the subject of sex is mentioned implicitly after this process of feeling you out has taken place, it's just you and the other person alone at that point. Is that correct? A. That's usually the case.

Q. In any situation you've ever encountered where someone has suggested that you and he engage in a sex act and money was not involved, is that — has that invitation ever been given to you while there were other people in an immediate ear shot? A. Well, I've been in bars where it happened.

Q. Well, I'm going to get to the bars in a minute. Let's talk about the street for a moment. A. I can't remember any case where it may have happened.

THE COURT: I'm sorry, this is when money was not or was?

MR. GARDNER: Was not. When somebody was just looking for a friend to spend the night with or couple hours with and you were talking on the street; the invitation and the talk about sex would always occur when it was just you and him alone?

[R143]

THE WITNESS: Well, usually there were people in the area but I wouldn't say they could overhear you.

BY MR. GARDNER:

Q. Now, you mentioned that some time you were in bars. Is it part of your duties as a Vice Officer with respect to this statute to go to gay bars periodically? A. Well, not really with

regards to the statute. We would go on a complaint from the State Liquor Authority.

Q. For the State Liquor Authority? A. Yes. We'd go on a complaint that there's a disorderly premises, homosexual in the places — now I'm going back a few years because the way the laws have been changed, we don't usually investigate this type anymore because we don't get too many complaints anymore. What used to be a violation before the Liquor Authority is not anymore.

Q. Now, it's your understanding it's not a violation as far as the State Liquor Authority is concerned for gays to be in a gay bar? A. That's correct — well, the dancing and things are not violating [sic] anymore so we don't — we didn't investigate them as much as we used to.

Q. Do you and other officers of the Vice Squad still within

[R144]

the last two years occasionally go into gay bars dressed in civilian clothes? A. Yes. We do.

Q. What would cause you to do that, for what purpose generally? A. Well we would get a complaint that acts were taking place in this premises.

Q. Sex acts? A. That's true. Like in the men's room and we would go in there and we would just hang around to see what would happen.

Q. Would you ever go into a gay bar with or without a complaint just to see whether anybody would invite you home for sex? A. I haven't for the last four or five years but we have in the past, yes, we used to go into bars.

Q. But for the last four, five years you haven't? A. No.

Q. To your knowledge for the last two years has any other member of the Vice Squad gone into gay bars just to see if they

would be invited home for sex somewhere? A. I can't recall any arrests being made in bars within the last two years.

Q. Do you recall anybody going into bars to see whether that

[R145]

activity would take place? A. I can't recall. I would say we went in on complaints, I can remember one in particular.

Q. Were you involved in the arrest on this particular case, officer? A. I assisted the officer who made the arrest, yes, I did.

Q. There was no claim and there is no claim that there was any money involved in this particular case, is there? A. That's correct.

Q. Is it correct to state that in this particular case there was an extensive conversation that went on between the arresting officer and the assisting officer and the defendant before the subject of sex was actually mentioned? A. I believe so.

Q. And do you recall in this particular case at a time when a conversation was taking place involving the defendant and with the complaining officer present in civilian clothes in a small group of people, some uniformed officers came along and told them all to move along including the undercover officer himself? A. It wasn't a uniformed car but there was a car stopped, police car.

Q. And in fact, is it true that the police car we're talking

[R146]

about and the officer in that car were aware that one of the people they were shooting down the street was an undercover officer? A. I don't think that they made that determination until they stopped.

Q. Stopped what? A. Stopped in that area where this group of people were.

Q. But they made the determination before they told the group to move on. Is that correct? A. I believe when they stopped, they realized that one of them was an undercover officer. They told everybody to move and everybody did.

Q. Including the undercover officer? A. Yes.

MR. GARDNER: Nothing further, Your Honor.

BY THE COURT:

Q. Officer, how many people congregate generally, let's take in the summer on a weekend night on that street corner or a street corner in Allentown that you have reason to believe are homosexuals? A. I would say as many as fifteen, not on one corner.

[R147]

Q. Total? A. Total.

Q. Between, say, Delaware and Park, that's where most of the people are? A. Yes.

Q. That would be fifteen on an average? A. I would say at the most. And that would be anywhere between 10:00 and 3:00 in the morning and later I've seen them.

Q. Would you say every weekend night there's how many people on these corners? A. I wouldn't say every weekend night. During the summer this past year we've had quite a few people hanging around there but I've arrested in this area for over ten years.

Q. You have? A. Yes. I have.

Q. Do you find — do you have reason to believe there are more homosexuals there now or less than was some years ago? A. There seems more up on North Street.

Q. And on some weekend nights on those hours there's nobody there? A. As you get into the colder months, yes, but in the summertime it was pretty busy on the weekends.

[R148]

Q. What do you mean? A. I'd say I've seen fifteen, I've seen four or five.

Q. Would these people stay in a congregation or group or would they be sort of loosely distributed or would it vary?

A. It would vary. Like on Delaware and North there's usually four or five and they sit on that bench and hang around and then on both sides of the street there's people there and on Irving Street and Park Street, they hang on them corners.

Q. Are they in the residential areas down Irving and down Park or mainly on the corners? A. Well, now it's mainly on the corners, over the years it used to be all up and down Irving, but they changed that into a one way street which secured a lot of that problem.

Q. Are they [sic] gay bars in Allentown? A. There's one up on Elmwood.

Q. In the Allentown area? A. Yes. Between North and Allen.

Q. There's one in that area? A. Yes.

Q. Have you received complaints from people in the area or businesses of this sort of activity? A. I personally have not received any.

[R149]

Q. Do you know of any? A. From being in the office I read the complaints in the books, these are the ones you go out on.

Q. What are the complaints? A. We have gotten them from Councilman Marcy that is reported to our office.

Q. Who's talking about prostitution? A. Well, we've always got complaints of homosexuals in the area so we naturally investigate it.

Q. Do you ever have complaints of homosexuals tampering with children in the area? A. No. I've never received a complaint like that.

Q. Do you know, or have ever received a complaint or read a complaint of homosexuals, let's say, this past summer accosting somebody who will be walking on North Street or in that Allentown area? A. No. I haven't.

Q. By accosting, I mean stopping and propositioning them, this would be other than policemen, somebody as a civilian who would come back and complain to the Police Department? A. I can't recall anything specific but I think we've had a complaint like that.

Q. How many this past summer?

[R150]

A. We may have had a couple, I can't recall if I read it in the complaint book.

Q. Would it be more than a couple or less than a couple, to the best of your knowledge? A. Maybe two or three, that's what I can recall.

Q. Do you recall any complaints from people in the area that live there of people hanging out on corners that have been calling other than councilman Marcy? A. Nothing comes to mind right now but I'm not saying there isn't.

Q. Are there complaints of prostitution that from what I understand you answered two or three calls of people who were accosted, people walking through there and were propositioned, do you recall or ever received or read complaints of people who were propositioned, males propositioned by other males for propositioned? [sic] A. There was a complaint but I can't remember who it was. It was from some younger males being in this area that were out there, there was another male that's been arrested several times and he had

several young males out there prostituting and I can't remember who gave us that complaint, that's one that comes to mind.

THE COURT: I'm sorry, but I promised my stenographer she

[R151]

she could leave at 5:00 o'clock, it's 5:00 o'clock now so we'll recess at this point.

MR. GARDNER: That's fine, Your Honor. Are we through with this witness, I have a couple of questions of him so that he won't have to come back.

THE COURT: Go on.

MR. GARDNER: I'd like to ask one question. There are a couple of gay bars in the area on the corner of Main and Allen, is that correct?

THE WITNESS: Yes.

MR. GARDNER: And that would be the eastern end of Allentown area?

THE WITNESS: Yes. There are two.

MR. GARDNER: Nothing further.

THE COURT: Fine. Off the record.

(WHEREUPON, AN OFF THE RECORD
DISCUSSION ENSUED.)

(SEPTEMBER 25th, 1981. SAME APPEARANCES
AS NOTED.)

MR. LOKKEN: The People have concluded their proof I guess at the hearing. I don't believe Mr. Gardner has any more.

[R152]

MR. GARDNER: No. I have no intention to ask any more question or present any proof at the hearing, Your Honor.

THE COURT: Can we call the officer back for a couple of questions?

MR. GARDNER: Sure.

THE COURT: Unless you want to talk now. The other thing is do you want to have the arresting officer who is Nicosia here?

MR. LOKKEN: Yes.

MR. GARDNER: Does he want to hold the trial?

THE COURT: Do you want to hold the trial? Do you mind if I ask him questions during the trial that might relate to the hearing?

MR. LOKKEN: I have no objections.

MR. GARDNER: I have no objections.

THE COURT: All right, let's state now what you stated yesterday.

MR. GARDNER: Your Honor, in the responding papers that I've received, Mr. Lokken refers in his paragraph fourth, to the objection which is in paragraph two of my affidavit which goes to the question of the sufficiency of the information insofar as it uses the words "I'll blow you".

[R153]

There's no particular information that defines those words; however, having discussed it with the District Attorney further and my client and noting the District

Attorney asks Your Honor to take judicial notice of the colloquial meaning of those words, I offer the following stipulation. I offer to stipulate that it is the common and ordinary understood meaning of the words "I'll blow you", among lascivious adult males in the United States. That the speaker is proposing to engage in the sex act being addressed which includes physical contact meaning the speaker's mouth and the other person's penis, or, in other words, what's defined as Deviate Sexual Intercourse as one of the methods. If that stipulation is satisfactory, we can clear that up.

MR. LOKKEN: Yes, I have no objection to that stipulation.

MR. GARDNER: With that in mind, Your Honor, I would withdraw the objection to the sufficiency of the information and I would stipulate that the stipulation I just made may be considered by the Court for the purposes of reviewing the motion on the

[R154]

information and also may be considered in connection with the proof at the trial.

THE COURT: All right, sir.

MR. GARDNER: Is that satisfactory?

MR. LOKKEN: Yes.

THE COURT: So stipulated.

MR. GARDNER: Now just a short word, Your Honor, I know you have some additional questions but I told you I would say very little and I will. I think that what we heard yesterday tells us in effect that what is perceived as a major problem by the public officials and other officials in the area regarding prostitution, I think

it is an unfortunate happenstance that people tend to confuse consensual non-obtrusive homosexual behavior and interaction among homosexuals as somehow impacting on this problem. I think we saw that on the councilman's testimony and to some other extent in the other testimony we heard, as a matter of fact, as indicated by the Sergeant's testimony which I thought was very forthright, candid and correct, in actual fact there is no problem

[R155]

presented to the public with respect to the kinds of careful rather restraint [sic] communication that goes on between homosexual dealing and feeling out to try to find out who is among them and who would be receptive to that kind of conversation. And with that mind, I would point out in the answering affidavit certain of the things I think the Court should take particular notice of, namely, the District Attorney on page five of his affidavit indicates that the solicitation that is implicit in the statute quote, "it is directed toward strangers in public, not toward acquaintances in a secluded setting and involves an unbidden, pointed inquiry into a most private and intimate aspect of their lives." And, on the next page the District Attorney says the statute simply outlaws contact which inhibits the free use of public space by members of the society at large. The testimony you heard yesterday indicates, however, that number one, there is no inhibition of the free use of public space except as Mr. McCarthy indicated as he perceives

[R156]

it psychologically in himself and, number two, you can hardly say the invitation or inquiry is directed solely toward strangers in public when in fact, it's only

mentioned after simple attempt at — after acquaintances have been established and there's some reason to believe this on the part of the speaker and that the individual would be receptive to that kind of invitation. And after noting its interest, over all the fact remains the statute must stand or fall on its face and what witnesses tell us on the stand whether it happens to be favorable to me or favorable to Mr. Lokken is quite irrelevant. The statute is overbroad. If the police and public officials are concerned about the prostitution, the prostitution problem, they have statutes to deal with that; if they're concerned about acts of homosexuals that are so overt or so outrageous or so offensive and very obvious to people passing by, there's statutes to deal with that, and the legislature has power to pass additional statutes to that. This is overbroad because it prohibits itself

[R157]

as well as the overt, obnoxious prostitution type of homosexual, the quiet, musical, intellectual who simply is there and somehow gives himself away by some communication, it does not even technically require on the solicitation [sic]. I rest on my brief and ask that at this point it be declared unconstitutional.

THE COURT: Could you be more specific, I understand the different grounds in your brief and I know you rest on the brief, and I have heard the testimony of Mr. McCarthy and Mr. Freudenheim. But still, if you're a property owner and I realize these people did not come out with strong language, I remember that Mr. Freudenheim described his feelings towards what was going on in front of his hotel or what he thought was going on at his hotel as distasteful. Mr. McCarthy was talking about being apprehensive and saying it was an inconvenience

to have these groups of people on the street corner or on a street and the vehicle traffic, first of all, their tolerance

MR. GARDNER: I understand.

[R158]

THE COURT: And Councilman Marcy, too.

MR. GARDNER: I understand. I don't attack any of them, their integrity and intentions I'm sure are fine.

THE COURT: I'm reflecting on these groups of people, or gangs as I said at one point yesterday, groups of people sometimes as much as fifteen and as we were told by Officer Burgstahler sometimes four or five in a block. They do prohibit somebody walking the street, I think even if they're middle-aged or elderly as occupying the Lenox.

MR. GARDNER: Let me speak to that if I may. It was in the 1950's or 1960's that the people of Dunkirk were very upset and annoyed and just as concerned as Mr. McCarthy was and probably more so by the fact that puertoricans [sic] living in a community would as a matter of practice stand out on the streets at night in groups of people singing, dancing, joking with people, whatever. But, large amounts of people on the streets which is typical apparently of the puertorican [sic] culture but it's not typical of certain middle class white Anglo-Saxon culture and it was disturbing

[R159]

to the people of Dunkirk. They passed some kind of ordinance to prohibit that, that was taken to the Court of Appeals and declared unconstitutional — and I'm sorry I can't give you a citation — but essentially they

said the law can't say that because we don't understand your ways and we don't like your ways and we don't like your ways and therefore you don't have the right to use our streets, we want you to use them as we do. Namely, you walk by, boyfriend-girlfriend-type thing and you don't stand at a corner for over fifteen minutes, we find that an affront to our comfort; and secondly, -Your Honor, I would point out to you that if a statute was judging [sic] by what the majority of a community found comfortable or acceptable or not annoying or whatever, there would be no need for a Bill of Rights because then we can have a parliamentary system and what Parliament said would be okay. I'm sure to this day there are many people who find interracial marriages unacceptable yet in the '40's or '30's at that time when it was less

[R160]

understood and less acceptable, particularly in other areas of our country, the Supreme Court said you have no right to declare it illegal and to prevent it even though almost unanimously among the white population of the South it was highly offensive but the Supreme Court said no, it's not good enough. So what I earnestly and respectfully submit, it doesn't matter whether good intentions, friends and citizens of mine who take the stand here find these people to be unacceptable and undesirable people in the neighborhood. We don't have a law that permits any more people to be moved out because they're undesirable, that's a tradition of our frontier past when the marshall would say, get out of town and don't show up again. It's impossible. I have to say to these people to the extent that can validly assert rights such as trespass and noise and harassment and things like that, those laws can be enforced but to the extent that merely because you are standing quietly and

living a certain life-style that neither approve of [sic] so you must

[R161]

get out of town. They have no support or law.

THE COURT: You're saying the fact finding in this may be irrelevant but I thought under People versus Smith case which I think we should just hear what was going on.

MR. GARDNER: I have no objection to the hearing but as I expressed at the very beginning, Your Honor, I have no objection to the hearing being held but at the same time I wanted the Court then to understand that I doubt very much it would have any relevance by the ultimate decision of the Court; at this point, at the conclusion, I reiterate that position. In People versus Smith, if I recall correctly, what the case is about, Your Honor, it is referring to I think as the case that had to do with the loitering for the purpose of prostitution statute, is that not correct?

THE COURT: Yes.

MR. GARDNER: And the Court of Appeals held that statute to be valid but in so doing the Court of Appeals noted that the Statute requires a number of specific obvious observations and events to happen before

[R162]

there could be an arrest and that it tended to take away the chance of unbridled discretion on the part of the Police Officer and also implicit if not explicit in that decision was the fact that the ultimate activity toward which the statute was directed related to prostitution which is insofar as illegal. In our case which is not at all untypical, we have a young man who invited someone to

his apartment and in the process of that invitation once there to participate in an act of sexuality, deviate, to the majority of Americans is nonetheless fully legal to Onofre. You have to distinguish the ultimate object of the safety as legal and, number two, you do not have in this section the kind of safeguards to the extent they are there for the Loitering for the Purpose of Prostitution. But in any event, I would point out that you can judge that by reading the statute. The Court of Appeals decided that *People versus Smith* on the basis of fact findings as to what community leaders felt was the problem, maybe I'm wrong there but I think ultimately the decision in

[R163]

People versus Smith was based on the Court of Appeals analysis on sex itself and the safeguards it presented. Also, I think it was an analysis of the facts of the case itself.

THE COURT: What did the officer see, what was the defendant doing.

MR. GARDNER: Oh, yes, that would go to the question as to whether the standards of the statute were in fact met but in terms of the issue as to whether this statute was constitutional, in one case the officer may have a good fact case and in another case the officer may have a less good fact case. The issue as to whether the case is constitutional, at least I submit it ought not to hinge on the fact of whether the issue in this case is whether the police have a solid fact case, rather than in another case where they don't have so good a fact case.

THE COURT: I understand that but if the Court were to write in without a fact finding of a lot of statements that occurred I think that would be wrong. In other

words, if there was no basis on some hearing to talk about the inconvenience to the

[R164]

public, to the shop keepers and whatever else they went off on to find these people with —

MR. GARDNER: I'm in no way criticizing the Court for holding the hearing, I'm saying as a matter of law it seems ultimately the decision whether the statute is constitutional, it has to be looked at as if one were there at the moment the law was passed and without yet having seen how it was going to be enforced. One can attack particular cases based on the facts of those cases but the question of the fact is that the statute has to be analyzed in abstract because the determination has to be the same for Salamanca as well as for Buffalo.

THE COURT: One other point I have, and I understand what you're saying about doing things in abstract and I needed to hear what those officers were saying, both Captain Kennedy and the other officer. I needed it because I can't conjecture up nor can I see where this does mount to a stag line up and down the street. In other words —

MR. GARDNER: Well, let me —

[R165]

THE COURT: In other words, say at some point we're not dealing with four or five people, say there's fifty.

MR. GARDNER: Suppose there's two hundred fifty, you could have a situation where you could have masses of people standing there all night long and it's difficult for people on the street to get some sleep and things of that sort. Without being tested too closely on my

knowledge of the present Penal Law, I think there are statutes including disorderly conduct, including loitering, including trespass and some other things that may come into play on those conditions. But, let's say there isn't that which comes into play on those kinds of conditions, the legislature certainly has the power to pass a law that is directed not to the presence of someone in public for the purpose of soliciting someone to engage in the deviate sex but directed to the real problem you're imposing, masses of people on a residential street who by their presence are creating legitimate concern of safety and peace and good order. I would hesitate to try

[R166]

to draft that statute as I stand here talking to you but what I'm saying is that that question has to be saved for another day. I would say this statute if it has got to be analyzed and can be approved, if Your Honor finds it's constitutional, if we assume that there are just two people on that street at a given point in time, one approaching the other for the purposes of making a solicitation similar to what is charged to have been made here, if it's constitutional under the circumstances then I say it's constitutional for the other circumstances as well. But, if you take out those other facts that the statute doesn't talk about there's nothing in the statute about how many people are present or how crowded the street is, whether it's residential or downtown. At the moment the officer said they no longer arrest people in gay bars for these kinds of solicitation but they used to and if you look at the statute they could still do it, there's nothing in the statute where it says in some public places it's okay and other public places it isn't;

[R167]

in a gay bar even though it's a place where people are going to hardly go if they're going to be offended by homosexuals it's nonetheless a public place, it's enough of a public place that if sex is going on officers still go in and arrest even now.

THE COURT: So what you see as a statute where at the present time as far as that kind of locale is concerned is enforced with some restrain [sic] but on the face of the statute it's still applicable?

MR. GARDNER: If I may make one other point but we had a problem — well, not a problem, Captain Kennedy was very unhappy when the Court of Appeals knocked out the consensual sodomy law and again he was concerned about the social problems that had been talked about in this hearing. As I pointed out at that time and is definitely clear, the legislature could even now pass a law outlawing public sex of any kind, homosexual, heterosexual, deviate or so-called normal; there's nothing to stop that, the fact that they haven't done so doesn't mean that the consensual sodomy law should have been left on the books,

[R168]

it means that someone yet has not carried the burden of persuading the legislature to deal with the problem in that way.

THE COURT: There's no question that a law could be passed to deal with that problem, I don't think your reference to public lewdness applies at all.

MR. GARDNER: I didn't suggest it necessarily. I was asking questions and I recognized there's problems of public lewdness pro and con but the point I'm saying,

you don't have a law which could be passed as no argument for leaving on the books an argument which is overbroad that even encompasses legal activity as well as

THE COURT: One reason for the hearing is to get background for me and it's on the record of what is the so-called problem and how things — what happens when an officer approaches a group.

MR. GARDNER: I understand.

THE COURT: And I think in all it probably turned out favorable to you.

MR. GARDNER: I think so, too. And as I say, I claim no error and I made no objection to the holding of the hearing.

[R169]

THE COURT: Now, a lot of things you say and hear about the actions of homosexuals during arguments are things that I don't know enough and unless you can refer me to some other statute I have a hard time taking judicial notice of.

MR. GARDNER: I don't ask you to take judicial notice of anything in my papers, Your Honor, I think I made a motion and I've asserted in the papers what I think a plain reading of the statute shows in terms of how it will affect various situations. I don't propose to any truth to support that homosexuals do this or do that, my understanding and this is not submitted which Your Honor can take judicial notice of, but my understanding is there's over 20 million homosexuals in the United States and you're going to find all kinds of people in that group. Some of those people you and I would consider to be upright, honorable people with

high positions, judicial, politics, professional and so on and some who waste their lives on drugs and alcohol and things of that sort. There is simply no way one can generalize that these are what homosexuals are and this is

[R170]

how they act and therefore, this is what the law should say or should not say. The law has to be analyzed as if we were talking about cubans or any other group you would want to pick out and it has to be determined whether enough background to understand what the law is seeking to direct itself toward as to whether it does so without violating free speech or some other things I've mentioned in my papers.

THE COURT: In other words, your statements that homosexuals need to meet each other in public, correct me if I'm wrong, if I'm distorting what you said —

MR. GARDNER: No.

THE COURT: In situations like this so they can have full use of their life and liberty however they want to act — I don't know that they do.

MR. GARDNER: Let me speak to that specific point. In making that statement I'm here defending a criminal case, it would not be appropriate for me to bring in sociologists to prove the specific points, but the point I'm making and the point I think Your Honor does know is that there is no

[R171]

established socialtale [sic] pattern for homosexuals to deal with each other and get to meet strangers who are homosexuals. The society as it is is not such that if a lawyer were to appear before you who happens to be a

homosexual, he's, he's liable to tell you about it. Ultimately, if he were a heterosexual it would be quite the nature for him to hold hands with his wife as they left the building, if on the other hand, they were to walk out of the building holding hands with another gentleman even though it's not illegal it would be found quite offensive in the ingrain [sic] cultural habits and patters [sic] of modern American life. Is that impetus as for the homosexuals to remain in secrecy. The only thing I'm saying to Your Honor is that it must be obvious to all of us that that being the case, being the case you don't have open meetings of homosexuals, Kawanis [sic] Clubs or anything of that sort; insome [sic] way if you have 20 million homosexuals in this country, you have to be of the nature — I don't think they have been but they could be, celibate.

[R172]

It's not a standard applied to heterosexuals but if they intend to have to meet each other they have to reach out and find each other. If they don't happen to drink or they're not into the bar scene, I don't know of anyplace in Buffalo they can go. They're not going to be shown on television in advertisements, you don't see advertisements in the newspaper that there will be a meeting of — with people interested in making — meeting homosexuals. One doesn't need to prove the world is round, one can observe the nature of the world if a country of massive quantities of homosexuals want to meet a homosexual at some point, somewhere he'll have to reach out and try to become acquainted, that's all I can say. Surely we know and it doesn't have to be proved that you have singles bars where people go and meet for the purposes of meeting girls and vice versa, maybe they don't immediately talk about sex or maybe they do, I don't know, but the scene on Elmwood Avenue is a

place for guys and girls going out certainly it isn't something that has

[R173]

to be proven. The point is there's enough on the face of the statute to analyze whether this cuts equally across the board with heterosexuals and homosexuals. I think there's enough for the Court to reach a decision to the constitutionality of this statute in this context.

THE COURT: I think the witnesses were too sensitive and tolerant to talk about what they clearly could show by dollars and cents; was that there property was in danger of losing of its value, the enjoyment of that and there was a substantial chance that their businesses would be affected or what's going to happen in the future.

MR. GARDNER: That's right, it's sad. I suspect there's people on my street who would say the same thing of their values if black people were to move in but that doesn't give any legitimacy or any effort to try to keep the black people out.

THE COURT: Or cubans, blacks —

MR. GARDNER: That's right. There's no legitimacy. At some point we have to say this is a nation of laws, civil rights, bills of rights, and you have to work out your personal feelings and you have to

[R174]

try to do the best you can, but we don't take away rights just because the owner of a hotel feels uncomfortable or because living on Irving Place you feel psychologically effected because these people are around.

THE COURT: And your interpretation of the law is specifically what now, you talked to the right of people expressing themselves, etc.?

MR. GARDNER: Putting aside the argument of vagueness which I grant the facts of this case don't really present because that portion of the statute couldn't come into play, and put aside the argument of unequal applicable laws which I think is argument but not what I'm fond of because it's so easy for legislature to remedy. For example, as I suggested to Councilman Marcy, I could go out and solicit him for sex and I'm guilty, I could go out and solicit his wife for sex and I'm not guilty, ultimately both acts are highly offensive. Now the real point is, I don't think the law can validly say that a man or woman in public for the purpose of meeting a man or a woman and inviting that person

[R175]

to a private place to engage in deviate sexual activity, I don't believe that kind of law can be passed as long as the conversation is secret; it is not notorious or apparent to other people who can overhear the conversation and as long as the invitation is directed at an act that will occur in private and as long as the individual who extends the invitation takes no for an answer. In effect, the person who hears that invitation, "no, thank you, I'm not in for that", and walks on, as long as that person says, "okay", and walks away, I don't think the law can intervene. Now the person who says that may run the risk of getting his nose punched in, that's one of the practical risks of this life, but that's different from the law saying you shall not issue that type of —

THE COURT: What is your basis when you object to the law, why? You've gone through vagueness, and the equal protection?

MR. GARDNER: It's all in my papers, all I can do is read my original motion papers, Your Honor.

[R176]

THE COURT: I dealt with this under the guide lines of the Equal Protection Law?

MR. GARDNER: Well, I wanted to emphasize that so you'll see in my motion papers that I stand heavily on the concept of the right to speech, right of free association and the absence of any legitimate public purpose that the government can have to prevent one individual from having a private conversation with another individual and inviting him to his house for any lawful purpose. If I were to ask Mr. Lokken to come to my house to have a drink of beer that is no more unlawful or no more subject to being made unlawful if I were to invite him to my house to engage in deviate sex, as long as the act of deviate sex is lawful as Onofre teaches us it is.

THE COURT: Onofre, the only grounds for public action cannot be violated under the Equal Protection Laws.

MR. GARDNER: My point is that Onofre was talking about the sex acts itself.

THE COURT: That's true.

MR. GARDNER: And my point is when sex — the sex act itself is to occur in private the fact that the invitation

[R177]

is discretely conveyed even at a public place, it is not — cannot not be prohibited, not everything that occurs in a public place can be prohibited by government nor everything that occurs in a private place is immune from prohibition.

* * *

[R185]

MR. GARDNER: As I understand it from remarks off the record late yesterday, we have stipulated and we should formalize it on the record now, that in view of the fact that Your Honor is going to reserve decision on the motion as to, which we've concluded all of the testimony and all of the arguments and in view of the fact that the

[R186]

arresting officer is present, the District Attorney and I have stipulated that we go forward and hold the trial now recognizing first that as you indicated earlier the testimony you hear at the trial can be considered by you in connection with the motion if you wish, and recognizing also that if you were to grant my motion there would be no occasion for you to render a verdict on the testimony of the trial and therefore, you'll be in effect making a decision on the motion and if it's appropriate on the trial at the same time.

THE COURT: So agreed.

* * *

[R187]

(WHEREUPON, OFFICER BURGSTAHLE THEN
RESUMED THE WITNESS STAND.)

BY THE COURT:

Q. Officer, you've heard many of the comments while you've been out there sitting and waiting? A. I've heard some of them, I was in and out.

Q. I have a few questions. You gave me numbers and averages, things like that yesterday concerning both homosexuals who are not overt and the ones who are either homosexuals or male prostitutes working in that Allentown Street area — A. North Street.

Q. North Street. I gather you told me you do make arrests from time to time of prostitutes in that area? A. Male prostitutes, yes. We do.

Q. And that's by going up in a car, your own cars or something like that, unmarked car, getting them to come over and there's an offer made? A. That's one way or on foot. But we also makes arrests for loitering that way where money is not —

[R188]

Q. In other words, would a male prostitute be in a car and also on foot, either way? A. Not usually. They would usually be on foot.

Q. These are generally the younger people? A. Usually.

Q. And when you testified there's groups of people there, four or five in the summer as I think a figure that you mentioned, and sometimes fifteen in the two block area, during the evening, would there usually be male homosexuals in those groups, if you know, or if you could tell? A. Well, there could be. It would be hard for me to —

Q. Are their actions any different from other people. In other words, the people you believe to be homosexuals? A. Well, to my knowledge, there would — they would be more overt, more active.

Q. Are they the ones flagging the cars? A. Yes. Right.

Q. How would you know when the homosexuals would have customer, would they slow down or something? A. They drive through the area several times, they look at you if you're standing there, they pull over to the curb and park and blink their tail lights if they want you to come up.

[R189]

Q. From that and from these other actions, could you tell — So, it's generally the male prostitutes that would be standing there and these would-be customers come up? A. That's true.

Q. And the prostitutes would be the fellows flagging the cars and responding to these cars? A. Yes. More so than the regular person who's out for just meeting somebody.

Q. These people generally meet one another on foot?
A. Well, that's hard to determine.

Q. Does it lead to a lot of congregations in the area?
A. Sometimes it does.

Q. Like what, describe it? A. A car will stop right on North Street without pulling over to the side of the street and it's hard for another car to get around him.

Q. On nights when there's a great deal of activity there I guess on weekend nights in the summer, would there generally be — I have a hard time getting pictures — there would be people on North and Delaware bus stop bench? A. Yes.

Q. And these would be people you would suspect or have reason to suspect would be homosexuals, is that correct?

[R190]

A. Well, I wouldn't suspect all of them.

Q. But some? A. Yes.

Q. And then do you know at different locations in this two block area or even three blocks or four block area, that there would be other people spread down? A. That's true.

Q. And then where you get a congregation of these people spreading down the street, some of these people would be male prostitutes? A. Yes, that's true.

Q. So intermixed in these people there would be the male prostitutes trying to — A. That's right. They would be —

Q. They generally get their customers by cars? A. Well, that's where I would assume they do, I'm not saying they don't get them on foot either.

Q. From your observations, how many of these people — how many of these people that will be down there would be prostitutes? A. (No Response).

Q. Does it vary too much? A. It's hard to determine that. I don't know what percentage

[R191]

to say would be down there.

Q. But generally the people that are flagging cars down are the prostitutes? A. Well, usually I would say.

Q. How much effort is made to arrest prostitutes themselves? A. Well, we patrol that area every night, and if we see a group of people there then we're going to try to make arrests.

Q. You try getting in a car and bringing it up — A. Yes. Or we might walk the area on foot depending on what's in the area. If there's a group of people in the area —

Q. Is some of it determined to scare them off because they know who you are? A. Oh, yes. Most definitely, especially if they know our police car. Yes, they move.

Q. Do you have reason to believe that some of the people that are there at night are male prostitutes because you see them again and again? A. Oh, yes. Most definitely.

Q. And, some are just strangers that come and go and just leave? A. That's true.

[R192]

THE COURT: Anything else?

MR. LOKKEN: I have nothing further.

MR. GARDNER: I just have a couple questions:

RE-CROSS EXAMINATION BY MR. GARDNER:

Q. Officer, it's true, is it not, it used to be that there was a substation [sic] of male prostitution activities on Washington Street? A. Yes. There was.

Q. And when that was going on, was there prostitution activity by males up on North Street, to your knowledge? A. I don't know if there was any prostitution activity up there.

Q. But, there was, was there not, prostitution activity by homosexuals on North Street meeting friends? A. That's true.

Q. Is it fair to say that your enforcement efforts in downtown Buffalo have pushed the male prostitutes off Washington Street and that some of them migrated up to North Street area where the homosexuals have already been in for years past? A. I would assume that could have happened.

[R193]

MR. GARDNER: Thank you.

THE COURT: Anything else?

MR. LOKKEN: No.

THE COURT: Thank you, Officer. That's all. All right, pursuant to stipulation do you intend to call Officer Nicosia?

MR. LOKKEN: I call the arresting officer and at this point we're starting the trial as a matter of formality.

THE COURT: And as I said before parts of it I might consider the hearing itself.

MR. GARDNER: That's all right.

MR. LOKKEN: Would it be straying off the facts of this case, that's one matter we did not clear up. Would counsellor's examination — cross examination entitle him to expand?

THE COURT: Sure.

MR. LOKKEN: During this trial?

MR. GARDNER: So that's clear, I don't want to create any error in this record, Your Honor, I have no objection in view of the fact there's no jury. Your Honor is the decider of the facts and you've heard everything anyway, I would not raise relevancy objections on any of the testimony

[R194]

and I would rely on the Court to make such application of testimony as appropriate under the circumstances.

THE COURT: Is that satisfactory?

MR. LOKKEN: Just to that's clear.

THE COURT: All right.

STEVEN NICOSIA, 74 Franklin Street, Buffalo, New York, having been duly called and sworn as a witness on behalf of the People, was examined and testified as follow:

DIRECT EXAMINATION BY MR. LOKKEN:

Q. Officer, you're assigned to the Bureau of Vice Investigation in the Buffalo Police Department? A. Yes.

Q. Was that your assignment on August 7th of this year? A. Yes. It was.

Q. And were you on duty at approximately 3:00 A.M.? A. Yes. I was.

Q. And at approximately that time did you have occasion to arrest one Robert Uplinger?

[R195]

A. I did.

Q. Is Mr. Uplinger in court today? A. Yes, he is.

Q. Would you point him out and identify him by what he's wearing now? A. The gentleman in the striped sweater sitting at defense table.

THE COURT: The record will reflect the witness has identified the defendant.

BY MR. LOKKEN:

Q. Now, what were the circumstances leading up to this arrest, Officer? A. I was standing in the area of 140 North Street at approximately 2:50, I would say, and Mr. Uplinger walked up to me and began conversation; it was just a brief conversation more or less to the extent of hello, how are you, that type of thing. After a little bit of a conversation the defendant asked me if I wanted to get high and I said no. He said, "well, what do you like to do?", and I said, "I don't know, what do you like to do?". This went back and forth for a minute or so. A few minutes later and undercover police vehicle pulled up to the vicinity of 140 North

[R196]

Street where myself, the defendant — let me go back a little. Three or four other males came up to this 140 North Street which is the step of the Hotel Lenox, Mr. Uplinger introduced me to several of these males, just after that, this undercover police vehicle pulled up and told us all to get off the steps and leave the area of the hotel; we all left in separate directions, I walked west on North Street away from the hotel, Mr. Uplinger followed me and he asked me if I wanted to go to his place and again I asked him what he wanted to do and he said something to the effect, well do you just want to come over. And I told him no. Getting back to the undercover police, they identified themselves as Police Officers. I told him, no I'm scared with the police and I want to leave — I'm going to leave and he said, well if you drive me over to my place or go over to my place I'll blow you. At this time along with Officers Burgstahler and

McConky of the Vice Investigation Unit I placed the defendant under arrest. And this was at 3:00 o'clock.

Q. And repeating the terms, officer, I'll blow you meant oral sex? A. It's commonly referred to as oral sodomy.

MR. LOKKEN: I have nothing further.

[R197]

THE COURT: Mr. Gardner?

MR. GARDNER: I have no questions, Your Honor.

BY THE COURT:

Q. How long have you been on the Vice Squad or worked with the Vice Squad? A. A short time, Your Honor, since December of 1980. And during that time I was off for three months with an injury so it would maybe have been about six months or so.

Q. Have you patrolled this area on North Street before? A. Yes. I have.

Q. Have you ever made arrests in the area? A. Yes.

Q. How many would that be? A. In that immediate area I would, I believe, just one. I've patrolled the area, I've only been assigned there by police working undercover two or three times.

Q. Have you ever been assigned for this sort of investigation before to any other area where suspected homosexuals would congregate? A. No, sir.

THE COURT: I have nothing else.

[R199]

STATE OF NEW YORK — COUNTY OF ERIE
CITY COURT OF BUFFALO

THE PEOPLE OF THE STATE OF NEW YORK,
vs.

ROBERT UPLINGER,

Defendant.

DOCKET NO.: 4C-58993

[Proceedings of October 22, 1981]

* * *

[R202]

(CAPTAIN) KENNETH KENNEDY, 3160 Hopkins Road,
North Tonawanda, New York, having been duly called and
sworn as a witness on behalf of the People, was examined and
testified as follows:

BY THE COURT:

Q. I had some further questions about the status of the hearing and I wanted to ask you a question and Officer Nicosia, also. I just have a couple questions. A. Pardon?

Q. I just have a few questions of you. A. Sure, Your Honor.

Q. First, you are familiar, are you not, with this law, the loitering for the purpose of deviate sexual intercourse? A. Yes, Your Honor.

Q. And you've been a policeman for what, thirty-five years?
A. Forty years.

Q. And are you familiar with the prior law under which I believe it was applied only against homosexuals, the disorderly

[R203]

conduct statute? A. Yes, briefly.

Q. Which was phrased pretty much the same way except that you had to have disturbed the public and I think it was couched in soliciting men, something like that? A. Yes.

Q. Now, under the previous section, the disorderly conduct, that was only applied to homosexuals, am I correct? A. Yes. Generally speaking, that's what it was, Your Honor, I think it referred to a soliciting for the purpose or something about an act against nature, I think it has that in there, and it was generally applied to suspected homosexuals.

Q. The point being, under the prior one and the new one, which came in 1967, the one we're dealing with today, am I correct in assuming that until Onofre came down, right? A. Yes.

Q. And in the Court of Appeals — the Appellate Division which throughout the sexual — A. The sodomy law.

Q. Consensual sodomy law? A. Yes.

Q. Until Onofre came down, both the old one and the new one were only used against suspected homosexuals?

[R204]

A. Yes. I would say so, Your Honor, generally speaking that's what it was.

Q. Okay. A. There may have been rare cases where it was used otherwise but mostly it was in homosexual situations.

Q. So, only with Onofre did — frankly, the Police Department was trying to get around Onofre after it came down from the Appellate Division, did you start to use the loitering statute against the suspected prostitutes and their customers? A. Yes, Your Honor. And sometimes we would use it previously in

cases where there wasn't evidence of prostitution but of course, we had the sodomy law and we would mostly use that.

Q. You would use the sodomy law? A. Yes.

Q. Where would — A. We would catch them in an act of sodomy and then we would use the sodomy law, the violation of the sodomy law.

Q. So, then, am I correct in saying, then when the sodomy went with Onofre — A. Yes.

Q. — then you used this loitering statute?

[R205]

A. Yes. Almost exclusively.

Q. Because that's what it seemed like to me and that's what has been represented to me and that's why I'm asking the question. A. To my knowledge, that's what we've been using it as. And if we get a male and female in that same type of situation generally we stay towards the prostitution but we will use that law also, loitering.

Q. Now, we had testimony here — and I'll get back to what was testified to about North Street and Allen Street — A. Yes.

Q. — do you have a problem in LaSalle Park about suspected homosexuals? A. Yes. We do, Your Honor.

Q. Would you tell me and both counsel what problem that is? A. In LaSalle Park?

Q. For instance, we heard about suspected homosexuals or homosexuals or prostitutes on the corner of Delaware and North and down these two or three blocks of North to Elmwood? A. Yes.

Q. And we've had a lot of testimony from Officer Burgstahler, yourself, Nicosia and different residents — A. Yes.

[R206]

Q. — and you eluded [sic] generally to what you say is happening in LaSalle Park. Could you be a little more specific about that? A. Yes, Your Honor. Well, LaSalle Park, the situation there is we have some complaints but not near as many as we had in the Delaware-North Park area, Delaware and North area, and I attribute that to the fact that Delaware and North is a residential area where there's many homosexuals and many people view these conditions and call and complain about them. Wherein with the LaSalle Park, we would sometimes get complaints from parents or sometimes young boys would call in from other police agencies, police officers and say that the conditions down there are terrible and that there's a great deal of overt sex acts taking place right out in the public where the boys are playing, this is coming from the youths in the park, it's in full view. They say they go back into the bushes a slight ways and anyone walking along there all they have to do — in fact, I recall one complaint where they said the young kids were standing there giggling at them, watching them. We did quite a bit of work down there on investigations.

Q. When you have a situation like that and I have a question in my mind whether the public lewdness statute actually covers

[R207]

it — A. Public?

Q. You have to do it lewdly? A. Yes. Most of our arrests were under sodomy laws or else the officers would be directly solicited.

Q. So, now, with Onofre you can't prosecute anybody under the constitutional sodomy law? A. No.

Q. So, what do you do, go to the public lewdness or not at all? A. We use the loitering.

Q. Loitering. Well, other than the sex taking place in the bushes and things like that, is there anything else that disturbs people down there or you've received complaints about?

A. No. I don't think so, Your Honor. It was mostly of a nature of solicitation and young boys seeing acts taking place, then, of course, through our observations and through our surveillance of the area we would see that there would be cars parked there and men sitting in them and then they would be loitering around, walking around the fields and in the bushes and so on, apparently seeking a companion to commit these acts with.

[R208]

Q. LaSalle Park is where the kids have little league baseball?

A. Yes. There's baseball fields, football fields, swimming pool in the area, a large park area, playgrounds. Now the general section which this activity was taking place was on the same side of the street of some of these areas where these young boys would walk through the curbside and in the fields to walk through to get to the swimming pool or in going back over to where the general playground is. In other words, it would be on the far side from the lake there.

Q. That's on the east side? A. Well, it would be almost up a little bit to where the pumping station is, I'd say the length of a good city block. A. Other than watching and seeing activities, these activities which you say is interaction between the men and you say solicitation — A. Yes.

Q. — are the children offended or the parents offended by anything else that goes on? A. No. Not that I know of.

Q. In other words — A. I know one of the Police Officers told me the young kids there are playing ball and going through and seeing all this and —

[R209]

Q. And kids are solicited, are they? A. Well, I would assume, Your Honor, there's a danger that they may be solicited.

Q. You've never had a complaint? A. No. I don't know of that, no, sir.

Q. Is this near the men's room? A. Yes. There's a men's room — shelter house in the park there but the park is across the street and then in the area where the — most of the activity was was [sic] across a small street there from the men's room.

Q. D.A.R. Drive? A. Yes. That's right, that's what it is.

Q. So, there's only one bathroom facility in the whole park and this is occurring around the bathroom facility? A. No. Like I say, it's across the street.

Q. In the bushes across the street? A. Yes. Generally in the bushes or you see them loitering around on the edges of the bushes and so on walking around and that's usually an indication, you know, if he's not bothering anyone or not doing anything wrong then we won't bother him. But, then the officers were stationing themselves and there would be a short time that they would be solicited or else they will see an actual sex act.

[R210]

Q. There's no complaint of prostitution down there? A. No. I've never heard of any complaint of prostitution in there.

Q. Now, from the testimony here and I grant you I did understand what you said when you testified here about North Street and Allen, mainly North, Delaware and those streets there; you testified to a lot of soliciting going on by homosexuals of homosexuals? A. Yes.

Q. And of prostitution by male prostitutes? A. Yes.

Q. In that area? A. Yes.

Q. At night, mostly in the summer and on the weekends?

A. That's right.

Q. I just want to make you aware of certain testimony that seemed to crystalize it more and that's why I want to make it known to you. Councilman Marcy, the councilman from the area, took the stand and he testified if my recollection is right, that all the complaints he had related to the activity of male prostitutes? A. Yes. I think we had some complaints from him.

Q. He wasn't talking about homosexuals and homosexuals, he was

[R211]

talking about just male prostitutes? A. Yes.

Q. Or what he took to be complaints — implied complaints of male prostitution, he didn't talk about homosexuals? A. No, I don't think so.

Q. So, that's what I heard here? A. Yes.

Q. Kenneth Burgstahler testified that the people that are there attracting the cars, the males that are on the corners at night, a lot of people there, the males flagging down the cars and getting in the cars, there are male prostitutes, they are the active ones? A. I would say some of them are, yes, Your Honor, but it's just this apparent homosexual activity, solicitation or hanging around in that area. Now, the male prostitutes are generally a youth group, a younger group, and we had complaints of male prostitution there. We had complaints where I got a complaint from the State Police last time I testified, I didn't testify to it because I had forgotten, but I had a complaint from the State Police that one was supposed to be carrying a gun, one of the suspects, and that there was — I

think he said four or five young male homosexuals that were being promoted by a procurer who was in the area who

[R212]

we had known to be in the area.

Q. I don't doubt there's male prostitution because that's what everybody said. Officer Burgstahler said that the ones — as people go through this group the ones that are there talking about the blatant sex acts, the ones mentioning the words, those are the male prostitutes? A. I'd say, Your Honor, there are not male prostitutes, but they know the area was saturated by the complaints I've got about male homosexuals. I don't think it's a male prostitute. The one woman who called me who said her teenage boy would go out and ride his bike and she would — he would be solicited at about 7:00, 8:00 o'clock at night by men. She said he couldn't ride [sic] a bike but yet they would solicit him. I don't think they would be soliciting him for the purpose of prostitution and he wasn't a prostitute, she was complaining about it and she said he was deeply offended by it and she wanted something done about it.

Q. That would probably be a homosexual? A. Yes.

Q. But, again, officer Burgstahler testified that he couldn't tell — he knew, obviously, that there were some homosexuals there, he knew there were male prostitutes, he couldn't tell how many of each there were but they seemed to be

[R213]

inter-mingled — intermixed, but the point being the active ones, the ones really jamming the traffic and most flagrant of whatever they're doing are the male prostitutes? A. Yes. They could be, Your Honor, but I would say that the homosexual himself will go in an area and then there's a [sic] young male prostitutes that will be there and there's no conflict, you know, each one knows what they are but then the regular homosexuals

are generally an older person that you can have easily observed or at least say that it's suspicious after observing him for a short time and there were many of those in the area that we would see. Then younger prostitutes, a male prostitute, wherever we have complaints of a great deal of homosexual activity with the exception of LaSalle Park, I haven't seen the male prostitutes there nor have I heard of any, but like for instance we used to have years ago around the Hotel Lafayette, we used to have a great deal of activity, there would be a great deal of homosexuals and there would be a great deal of prostitutes. In many cases the homosexual is seeking out the male prostitute but then he's also available or seeking out other homosexuals.

Q. Well, did you say there is a connection then from your experience mainly on North Street which we're talking about

[R214]

between the presence of homosexuals looking for other homosexuals in the presence of male prostitutes? A. Well, I would say yes, Your Honor. If the male homosexuals are available — the male prostitutes are available, then the homosexuals would go to that area and there will be a connection in that aspect of it. Then, generally these male prostitutes are young, rough, tough kids that are pick-ups and someone who's a procurer in that angle will tell them go to this area and go to that area and they will be in that area. Now, word travels very very fast and then the homosexuals will go there in hopes of soliciting and possibly anticipating one of these young men or else he will meet another homosexual for his acts which happens quite frequently when the police officers are solicited they are approached and it's generally just an offer, it usually isn't prostitution. In other words, the homosexuals will pull up and conversations will take place, it will indicate he wants to commit one of these acts or wants the officer to commit an act on him but sometimes money will be mentioned but very very seldom, it's generally just a meeting and then an agreement.

Q. From your experience I guess Washington Street is no longer a problem?

[R215]

A. Pardon?

Q. Washington and — A. Lafayette and Clinton Street in that area, that used to be a very prominent place for them but it isn't so bad now. There are some of them but nothing like it was. They used to circle the block, they used to walk around there and be around there and you would see them quite frequently.

Q. And there you would find the homosexuals and male prostitutes mixed? A. Yes, Your Honor. As you say, it's been my experience that they will quickly know where these places are and that's where they will be and this is what led to many complaints in the North Street area as a continued flow of cars around there.

Q. Let me ask you this. Were you able to pinpoint — has this activity that we're talking about, prostitutes and male homosexuals, has complaints picked up, has there been more activity of it as the years go by? A. No. In the height of the summer, Your Honor, we had quite a few complaints.

Q. I don't think you had a problem like you don't have as much activity five or six years ago as you have now. Is that correct?

[R216]

A. It fluctuates an awful lot but I think we did have, Your Honor, I think there was more or less in different places and so on, but I know we have had in the North Street area, that's been a continued complaint — source of complaint. In fact, one of the woman that called me, she said you cleaned this up several years ago and now they're all back, can't you do something about it now. Like I say, it seems in the summertime — and I'm going back four or five years ago and maybe even

longer, that that area seemed to track them to the extent of all this cruising and even the complaint about traffic jams where the cars were bumper to bumper and I would go down there and see that and my men would go down there and see that. I can't say all these people were homosexuals but then it would appear they were looking for something. And when my men would be solicited, it would take a while and maybe they would question them or something like that but they would be suspicious of something starting or something amiss that there was something going to happen.

Q. If you know, did you have different areas that changed, in other words, the problem where the activity around Washington Street has lessened, correct? A. Yes. I would say it's less now. We made a major arrest out

[R217]

of there of what we classified as a major procurer, and he seemed to be the center of a great deal of activity but I still get reports of some activity there, but nothing like it was.

Q. Do you have any areas where problems have increased or traffic has increased? A. No. I don't think so, Your Honor. In fact, I think there's an increase of activity of units, gay units and so on where they go for themselves to dances and stuff and they're not out on the street as much as they used to be. We used to have an awful lot in theaters and now there is some activity in the summer around the X-rated theaters where they show these X-rated movies and there's some open sex acts taking place there, homosexual acts, but it's nothing like it used to be. For instance, years ago we used to have right across from Douville [sic] and Prospect Park a shelter house that was saturated with homosexuals, at that time sodomy was a felony and we brought so many in the legislature got together and said we can't be charging all these people with felonies and they changed it to a misdemeanor. We used to make massive arrests in the place and you couldn't go in the place without someone

soliciting someone. But in response to your question, I don't know of anyplace that's open or

[R218]

that active now, all I will say is that that area in North Street does become active in the summertime and now we're hoping it will level off with the cold weather and so on.

Q. Now, as it's been testified here, let's say you have a male prostitute standing alongside or down the street from or even on the same corner with a homosexual — A. Yes.

Q. — apparently both looking for customers or companions — A. That will happen from time to time, yes.

Q. — wouldn't it stand to reason that if the male homosexual is just standing there looking for somebody he isn't too interested in the fellow down next to him or a block away would be a male prostitute? A. Yes.

Q. He's looking for his own kind of companion rather than a male prostitute? A. Well, no, Your Honor, if the male prostitute is young and attractive to him then he knows he has someone right there but, he's going to have to pay. But he will turn to the male prostitute.

Q. If he can't get a companion, he'll turn — A. That's right. Or if a male prostitute is someone he — young and youthful are selling points in this male prostitution

[R219]

area and if he's young looking to him and attractive enough looking to him then he'll immediately go to him. But, if he doesn't want to spend the money or doesn't like the looks of these young lads and many times, I understand that they're afraid of being mugged or being beat up or something like that, then they won't go with them.

THE COURT: Will you excuse me for a second.

(WHEREUPON, COURT THEN STOOD IN RECESS.)

BY THE COURT:

Q. How do you know there is this connection that you described, if there is a connection between the homosexuals standing in some area, some distance away from a male prostitute? A. Connection, Your Honor?

Q. Yes. A. Well, generally they will be approaching one another and talking, something similar to that. In fact, they have a means of communicating which puzzles me through the years, at certain times where one would just look at each other and all of a sudden they would walk into an alley or a car and start their sex acts, this is between a male prostitute and homosexual.

Q. Do you know if there's any connection between finding the two in one area?

[R220]

A. Between them being in one area?

Q. Do you know if there's any relationship between a male prostitute being in that same area as a male homosexual?

A. Well, I would just assume, Your Honor, the homosexual is there not necessarily because of a [sic] male prostitutes being there but the male prostitute is there because he knows there's homosexuals in the area and they're the ones that would be seeking him out, I think that is a connection. Now, actually you must not be able to describe it as an actual connection or agreement but then if the male homosexual is available the homosexuals are going to quickly find out. Hey, there's a lot of young kids down there, let's go down, or whatever, there's conversations and then they go down into the area.

Q. Now, due to the fact that there may not be any homosexuals there at all but there can be a lot of homosexuals there that one is seeking out the other and they will quickly respond wherever there is an area where they're noticed or out in the

open. You mean prostitutes will follow the homosexuals home?

A. Prostitutes will find a homosexual and homosexuals find other homosexuals but, say, you have two or three homosexuals in any given area and they're going to be around the area for

[R221]

any length of time, a street corner or whatever it may be, and if it's convenient for them and why they select certain areas of the city I don't know, and when they do and once they establish their activity there, the word spreads around and then you'll see a lot of suspected homosexuals in the area and then suddenly you will see the young suspected male prostitutes come into that area.

Q. Has this been your experience? A. That's been my experience through the years, Your Honor, yes. And like I say, why they select them now — years ago we used to have at Main and Clinton, there used to be an area right in front of Kleinhan's Clothing store across from the Liberty Bank and it used to be saturated with them, that was many years ago, that's when I first came downtown on this type of [sic] work.

Q. But, in my own recollection and from working in the District Attorney's Office, I remember a killing, I remember it because I prosecuted the fellow who did not do the shooting, it was Houser and Feenie; Houser just got reversed and he took a plea anyway. It was a killing of a "John" and a "Homosexual John", I think it was a "John" in the back of the Hotel Lafayette at Ellicott and Clinton? A. Yes.

[R222]

Q. And the fellow was shot dead right there. I remember it not because I had anything to do with the case but because fairly recently one of your men, Marty Harrington and Paul Madson had a run in with a fellow who was a male prostitute

and one was — one of your men was pretending to be a male homosexual and both of your men ended up shot? A. Yes. Both of them ended up shot, in fact, one was very seriously injured and the other one, it just missed his heart by inches due to the fact that he had a fountain pen-flashlight-type of thing in his pocket, otherwise he wouldn't be here I don't think.

Q. The shooting at Ellicott and Clinton occurred about 12 or 13 years ago and the other one involving Harrington and Madson occurred about four or five years ago on Oak Street? A. I would say maybe three years ago, Your Honor.

Q. But regardless the point being that prostitution be it with female prostitutes or male prostitutes, it does pose a certain danger to the "John" be it male or whatever, a male "John"? A. Yes. The Police Department file, Your Honor, is filled with transactions of that type leading to murder and serious assaults and many times it happens where the prostitute, the male prostitute will be disguised [sic] as a female and the "John" or the customer will not be aware of that until he

[R223]

starts his activity and then he's aware that he's with a male instead of a female and then he wants to back off and then the male prostitute wants his money and all of a sudden —

Q. That's really female prostitution? A. Yes.

Q. I think the two people from the area, both Mr. McCarthy the homeowner, and the other man, the owner of the Lenox Hotel, I think somewhere in their testimony they talked about a problem they identified in their neighborhood which would be the North Irving area, North Delaware Avenue which would be on North Street, there's a problem with male homosexuals and male prostitution. Is that correct? A. That's right.

Q. And to the south on Allen Street there's a problem with female prostitution and general drunks and whatever else you have down there? A. Yes. That could be true, yes. Usually the

females occasionally they will come to Delaware and North but generally they will work down further and the males will use the main fare [sic] lanes. I received complaints about that, that there are, that they're using the parking ramp of this apartment house for their activities.

[R224]

Q. Are there homosexual bars in the Allen Street area, Allentown area? A. There's some of them, Your Honor, up around Main and Allen, there's two or three of them located there, Villa Capri and then there's a couple around there that I suspect but actually we haven't made arrests out of them. We see groups of people but like I say, it's difficult to classify them as homosexual bars.

Q. Why doesn't their socializing take place in bars? A. I think a great deal of it does now, Your Honor, more so than it used to and I think that's the fact involved that there's less of them out on the street and less of them soliciting and performing their acts outside. It's been quite a lengthy time now since we made an arrest in the bars, we go to them same as heterosexual bars; my men will go in and make observations or surveillances and then if they see something wrong or if they're solicited in there, they will make an arrest but it's been a long time that we've even made an arrest in a homosexual bar. Of course, the law used to be different, too, but then again, there used to be more solicitation around the homosexual bars and the law -- we -- the Alcoholic Beverage Control Law used to read that it was disorderly for homosexuals to be hanging around, in other

[R225]

words, in a bar and especially convicted homosexuals if we could identify them as convicted, and then the premises will be adjudged disorderly and we used to make reports to the State Liquor Authority frequently on that. It's been a long time since

we had to do that, most of them are very well policed and like I say, I can't really say there are homosexual bars.

Q. Finally, do you have or do you know of incidents of crime relating to male prostitutes in the North Street area? A. I have complaints and information, Your Honor. Like I said, one of them was supposed to carrying a gun but actually in that area I don't know and of course, it very easily could happen without me knowing; I don't know it to have an awful lot of assaults or robberies or things like that. You know, some of thathas [sic] happened up in the Allen Street area by prostitutes but there's quite a bit there in the Allen-Main Street area over a little further, but it's considered the Allentown area, but at North and Delaware and so on, I don't know of a lot of crime taking place there. There was one serious assault in one of the bars on Allen Street there, now whether that was a homosexual activity related, I don't know but I know a young man who was very seriously stabbed and wounded, that was probably, I'd say,

[R226]

two monthsago. [sic]

Q. Are these male prostitutes, male homosexuals who are some of them? A. No, Your Honor. I think they're just young street-wise kids that are out there strictly for the money, I don't think most of them are homosexuals. I suppose there are — there have been cases where there's been male homosexuals that have been male prostitutes, too, but most of the young ones that we see on the street while they're engaging in homosexual acts are, I think, just there for the purposes of commercial aspects of it.

THE COURT: Does anyone else have any questions?

CROSS EXAMINATION BY MR. GARDNER:

Q. Captain Kennedy, does your squad ever prosecute anybody under the Public Lewdness Statute? A. The Public Lewdness Statute?

Q. Yes. A. No. I don't think so. I don't think we've used that, there may have been occasions that we used it, but it's been a long long time.

Q. You gave the example of somebody engaging in open sex at LaSalle Park right where it could be readily seen?

[R227]

A. Yes.

Q. Have you ever given consideration to arresting somebody for public lewdness in that kind of a situation? A. Yes, I think there was something there but I don't know just what it was. I think it was advised by either the Corporation Counsel or the District Attorney's Office not to use that section unless you're — you positively had to.

Q. Can you describe for the Court what kind of situation it would be where you would feel positively had to use the Public Lewdness Statute? A. I don't know, I'd have to consult the section. Could I see the law there and would you point out the section to me. I think there was something there that required the intent to lewdly expose yourself.

Q. It's Section 245. A. It says with the intent to lewdly expose himself or engage in sexual acts or something — when he intentionally exposes a private part of his body in a lewd manner to commit such act. Yes, I think that's why I was advised not to use it unless we positively have to, but that was almost to prove the intent except by the acts, but I mean generally you have no conversation, these people won't say anything.

Q. I believe Officer Burgstahler testified at the last hearing,

[R228]

that in former years you had a congregation or number of homosexuals seeking companionship with other homosexuals that would go to North Street, but the male prostitute tended to be down in the Washington Street area but more recently as you've been cleaning up the downtown area, the prostitutes moved up to North Street, has that been your experience; in other words, that prostitutes on North Street is a more recent phenomenon perhaps because of more recent vigorous enforcement in the city? [sic] A. I would say generally speaking, that's what has happened along with homosexuals up there. In other words, what I'm saying is that it hasn't been my experience that the male prostitutes have taken over that area because they haven't, there is [sic] many many suspected homosexuals in that area.

Q. I understand. My point is, where as you find both just plain homosexuals and male prostitutes now, in earlier years you would tend to find just the homosexuals in the North Street area? A. Well, I'd say in the former years there were areas where there were just homosexuals in the Ellicott area down around Ellicott, Seneca Street, there were many of them in that area. In fact, we had a whole section there where homosexuals just cruised the block around and around and around walking

[R229]

in automobiles, and I don't recall male homosexuals being there. Now, they may have been without us knowing but we didn't have complaints or investigations didn't disclose that there were male homosexuals in that area and that's going back a good many years.

Q. Captain, I believe you've been quoted as expressing concern that this statute as not being declared unconstitutional in other words, you would like the statute to be upheld and not

struck down. Is that correct. I'm talking about the loitering statute? A. Well, I've expressed my opinion in the hope it would be upheld but that's up to the courts.

Q. I understand that, but we've been exploring generally in this hearing the need or the felt need that the law enforcement officers have for this statute to be available? A. Yes.

Q. That's what I'm directing myself to. As you look at what you perceived to be the problem in public areas of the city involving homosexuals or male prostitutes, is it your opinion that you need a statute to catch the homosexual who is simply inviting another homosexual to go home with him for some private sex or is the real need that you have effective legislation to be able to control the prostitute

[R230]

and male prostitute problem? A. No. I would say there's a crying demand for legislation and for a law to what we have now, the loitering law, to be effective in responding to complaints of groups of people say who are homosexuals saturating the area, committing other disorderly acts, urinating on their grass and so on and so forth, and walking up and down and soliciting people and I'd say that we have a prime need for the type of legislation that we can control this or do something to prevent this from happening and to respond to the public demand for police services. Now, these people have repeatedly told me why can't you do something about it and I can do something about it as long as I have the laws to work with but if the loitering section is taken away from us I don't have what will turn to.

Q. Okay. Just as a final question — I hope it's final, if a law were available and if the Courts would say the law was legal and therefore it can be used which permitted you to keep homosexuals from being together in public, I gather — I don't carry that to extremes but would make it possible to keep homosexuals from stopping and talking to each other on a public

street for an undue length of time, I gather that's the kind of statute you would like so you could meet .

[R231]

the complaints of a citizen. Is that right? A. No. I can't agree with that. Without the courts I think it's material to what —

Q. Listen to the question, excuse me. Would you please tell the Court what the need is as you on behalf of the Police Department see it, for the opportunity to arrest a man like Mr. Uplinger to stop and speak for ten, fifteen minutes with another man who was apparently happy to talk to him leading up to an invitation involving no money for the two of them to go away to a private place. Tell the Court why you feel that kind of statute is needed? A. Well, because this happens frequently and many people are offended by this type of approach and where it relates to a sexual act people don't like to be approached that way or be offended that way and people become frightened at this type of activity. People don't like to see it in front of their homes. Now, I've frequently come out in public and said if a group of homosexuals go and register in the Statler Hotel and go to their homes in private, which they're not out in the public where people can see them and they're not committing open sex acts and that which this innocent conversation that you referred to often leads to that, that leads to complaints for me. Like, these people will stop on

[R232]

a corner and this is where the police need is, they'll stop on the corner and have a conversation for a while and pretty soon they're into a car or in back of someone's side yard committing a sexual act or else if they're soliciting someone there's all kinds of acts that are offered here that call for police response or police action. But I — in no way do I just want a law where I see two persons together and walk up and say you're under arrest or you have to leave the area or something like that, we

wouldn't bother them if it wasn't for this overtone of offensive conduct and solicitation.

MR. GARDNER: Thank you very much, officer.

RE-EXAMINATION BY THE COURT:

Q. The problem is, how do you tell private from public, how do you tell what's going to happen from their conversation?

A. Well, that's why I feel, Your Honor, according to the statute now with conversation we have — whether it's in private or not, whether the other overt conversation is made for the act to take place where the act does place, I don't think there's any requirement there. In other words, if a man says I'm taking you to a home or taking you to a educational institution or something like that, I

[R233]

think the crime itself develops as a conversation where a Police Officer is involved.

THE COURT: I have nothing further.

MR. GARDNER: Nothing.

THE COURT: Thank you, Captain. Officer Nicosia, would you take the stand.

(OFFICER) STEVEN NICOSIA, 75 Franklin Street, Buffalo, New York, having been duly called and sworn as a witness on behalf of the People, was examined and testified as follows:

BY THE COURT:

Q. I just have two questions, officer. First of all, it wasn't clear how long this entire occurrence took whereby you ended up arresting, from the beginning to the end? A. Approximately ten to fifteen minutes, Your Honor.

Q. And there was something there about you being introduced to three or four people? A. Yes.

Q. Where did that take place? A. I was sitting on the steps of the Hotel Lenox on I believe it's 140 North Street.

Q. Did that happen before you met the defendant or when, during, after you met him?

[R234]

A. Slightly after I met the defendant.

Q. Would you relate how it happened? A. If I was sitting on the steps, the defendant was standing there talking, asking me questions like what I would like to do and do I want to get high, did I want to go to his place and then there were two others or three other males that approached the steps and apparently knew the defendant, they engaged in conversation and spoke to each other by first names.

Q. It didn't involve you then? A. No, Your Honor. I mean, I had no conversation other than —

Q. It was a short conversation and they left? A. Yes.

Q. This is before the police came up and made you move?
A. They left when the police came.

Q. Were they still there talking when the police came up? A. Yes.

Q. It was after you that they moved out and there was more conversation which led to the arrest? A. Yes.

THE COURT: Any other questions?

MR. GARDNER: None.

[R235]

MR. LOKKEN: I have nothing.

THE COURT: Is there anything else?

MR. LOKKEN: Nothing else.

THE COURT: The hearing is closed. I'll reserve on it and get to you as soon as I can.

MR. GARDNER: Thank you, Your Honor.

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FILED

MAY 17 1983

No. 82-1724

ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER, SUSAN BUTLER,

Respondents.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK.

**BRIEF OF RESPONDENT ROBERT UPLINGER
IN OPPOSITION TO PETITION
FOR CERTIORARI**

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Questions Presented

Is New York State Penal Law §240.35-3 (loitering for the purpose of engaging in deviate sexual intercourse, etc.) violative of the Fourteenth Amendment of the United States Constitution?

a. To the extent that the decision below is based on the premise created by *People v. Onofre*, 51 N.Y.2d 476 (1980), *cert. den.* 451 U.S. 987 (1981), did that case correctly determine that the United States Constitution protects the right of the individual adult to engage in private, consensual, noncommercial sex of a deviate nature (including sodomy and similar sexual conduct) under the constitutional right of privacy?

b. To the extent that the decision below is based on the premise that New York Penal Law §130.38 is unconstitutional as being in violation of the right to the equal protection of the laws under the United States Constitution, did *People v. Onofre, supra*, correctly so hold?

c. Is Section 240.35-3 of the Penal Law unconstitutionally vague?

d. Does Section 240.35-3 of the Penal Law violate respondent Uplinger's right to free speech?

e. Does Section 240.35-3 of the Penal Law violate respondent Uplinger's right to free association?

f. Does Section 240.35-3 of the Penal Law represent an unconstitutional and impermissible burden and impediment on the exercise by respondent Uplinger of his right of privacy as found under *People v. Onofre, supra*?

g. Is Section 240.35-3 of the Penal Law unconstitutional for any other reason raised in the record below?

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Relevant Constitutional and Statutory Material

UNITED STATES CONSTITUTION,

Amendments I, XIV

[Please see Petition, page 2, for text.]

NEW YORK STATE PENAL LAW

Section 240.35(3), Loitering, etc., and Section 130.38, Consensual Sodomy. [Please see Petition, page 3, for text.]

Section 130.00, "Sex offenses: definitions of terms

"The following definitions are applicable to this article: * * *

"2. 'Deviate sexual intercourse' means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva."

Section 240.20, "Disorderly conduct

"A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof;

"1. He engages in fighting or in violent, tumultuous or threatening behavior; or

"2. He makes unreasonable noise; or

"3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or * * *

"5. He obstructs vehicular or pedestrian traffic,
or

"6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or

"7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose. * * *"

Section 240.25, "Harassment

"A person is guilty of harassment when, with intent to harass, annoy or alarm another person. * * *

"2. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or

"3. He follows a person in or about a public place or places; or * * *

"5. He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose. * * *"

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OFFICIAL AND UNOFFICIAL CITATIONS
OF OPINIONS ISSUED BELOW

- N.Y. Court of Appeals: *People v. Uplinger*, 58 N.Y.2d 936, _____ N.Y.S.2d _____, _____ N.E.2d _____ (1983)
- County Court, Erie County: *People v. Uplinger*, 113 Misc.2d 876, 449 N.Y.S.2d 916 (County Ct. 1982)
- Buffalo City Court, Buffalo, N.Y.: *People v. Uplinger*, 111 Misc.2d 403, 444 N.Y.S.2d 373 (City Ct. 1981)

IN THE
Supreme Court of the United States

October Term, 1982

No. 82-1724

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER, SUSAN BUTLER,

Respondents.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK.

**BRIEF OF RESPONDENT ROBERT UPLINGER
IN OPPOSITION TO PETITION
FOR CERTIORARI**

Introductory Comments

Respondent Uplinger files this Brief in opposition to the petition of the State of New York. Respondent emphasizes that this consolidated petition arises out of two separate cases, not connected with each other and

litigated on separate records in the New York courts. Respondent's arguments herein are particularly relevant to the enforcement of the New York law against homosexuals, although the statutory provisions are, on their face, applicable to both homosexuals and heterosexuals.¹

Statement of the Case

Officer Nicosia was working undercover at the time, assigned "to talk to suspected homosexuals and arrest them if he was propositioned in public". *Petition*, App. D, 4d. Uplinger first encountered him at about 2:50 A.M. on the Buffalo street, a few blocks from Uplinger's home. Uplinger began the conversation with a "hello", "how are you", and general conversation of that nature. Nicosia joined in the conversation. Sometime while they were talking, Uplinger introduced Nicosia to some acquaintances who came along. While they were talking, other police officers directed them to move along, which

¹ At the pre-trial hearing in this matter, police testimony was offered indicating that Penal Law Section 240.35-3 was enforced against homosexuals exclusively, until the decision of *People v. Onofre*, 51 N.Y.2d 476 (1980), cert. den. 451 U.S. 987 (1981), declaring New York's consensual sodomy statute, Penal Law §130.38, unconstitutional. Thereafter, the deviate-sex loitering provision was used against suspected female prostitutes and their customers as well as against homosexuals. There was no evidence that either the consensual sodomy law or the deviate-sex loitering prohibition was used against heterosexual couples engaging in or contemplating non-commercial sex acts described by the statute. See references to the trial court testimony in the trial court decision of Drury, J., *Petition*, App. D, 2d-3d.

While this Respondent's arguments about the statute would in large measure be inapplicable to the position of a suspected female prostitute, as Susan Butler was, it should be observed that New York had adequate statutory recourse as to her under Penal Law §240.37, Loitering for the Purpose of Prostitution. That statute has previously been held constitutional by the New York Court of Appeals in *People v. Smith*, 44 N.Y.2d 613 (1978).

everyone did. Uplinger and Nicosia, again alone, talked further, with Uplinger inviting Nicosia to Uplinger's apartment and Nicosia asking what Uplinger wanted to do there. Uplinger gave a non-committal answer and, finally, responded by telling Nicosia that "I'll blow you" at the apartment. (Uplinger admitted and the State offered proof at trial that the quoted statement constituted a statement of intention to commit oral sodomy.) The conversation had continued for ten or fifteen minutes before that statement was made. *Petition, App. D, 4d-5d.*

There was nothing in the encounter to caution Uplinger that Nicosia would be offended by the proposed sexual act. Nicosia expressed no offense at the suggestive conversation leading up to the quoted statement. The situation (the time of night, the area of the encounter, the absence of members of the general public from the streets, the apparent desire of Nicosia to loiter and see what might develop, Nicosia's coy and interested attitude as the conversation developed) was consistent with Uplinger's mistaken impression that Nicosia, like Uplinger, was a homosexual expressing subtle interest in a potential sexual partner.

There was no one else within earshot when the statement was made. The anticipated sex was to occur in a private dwelling and not in public. The statement was made quietly and discreetly. There was no "stag line" in existence. *Cf. Petition, 17.*

Summary of Respondent's Argument

Point I. With the 1980 decision of *People v. Onofre*, 51 N.Y.2d 476 (1980), *cert. den.*, 451 U.S. 987 (1981), holding that private, noncommercial, adult, consensual sodomy was protected by the federal Constitution's right of privacy, the New York consensual sodomy crime (Penal Law §130.38) ceased to be enforceable, although the statute was never repealed. The *Onofre* decision comports with the earlier cases in this Court establishing the constitutional right of privacy.

The existence of consensual sodomy as a crime, however, was a necessary predicate of the loitering-for-deviate-sex provision (Penal Law §240.35-3). Where, as in the present case, the invitation was to come to a private residence for sex, it amounted to an invitation to engage in lawful activity which was, even more significantly, constitutionally protected.

If this Court grants certiorari here, it will inevitably have to review whether the law declared in *Onofre* in 1980 was a correct interpretation of the United States Constitution. For if it was not, the reasoning adopted by the Court of Appeals in *Uplinger* necessarily falls. (*Petition, App. B, 2b*). Respondent Uplinger urges, however, that *Onofre* was properly decided.

Point II. If, however, *Onofre* was correctly decided, there is no doubt of the correctness of the decision in *Uplinger*. The statute is unconstitutionally vague on its face. Moreover, by seeking to restrict the ability of homosexuals to socialize in public unless they have no mental purpose of deviate sex with their friends at a later time and more private place, the statute restricts the right of free association. To the extent that the

statute restricts the expression of a verbal invitation to engage in a legal (indeed, constitutionally protected) act in a discreet manner, without regard to whether the addressee would likely be offended thereby, it improperly restricts the freedom of speech. Finally, the statute imposes an unacceptable impediment on the attempted exercise of a constitutional right. The statute violates the Fourteenth Amendment of the Constitution.

Point III. The questions presented are important. The Court has declined to hear this basic subject matter in the past. If the Court is now ready to review the underlying question whether the private, consensual, noncommercial sex practices of adults fall within the coverage of the federal constitutional right of privacy, the present case presents the issue squarely. If review is to be limited to the question whether *Uplinger* was correctly decided, without reaching the underlying issue, however, the matter is not sufficiently debatable to warrant this Court's review.

Respondent Uplinger's Arguments Below

In his constitutional attack on the statute, Uplinger preserved the relevant arguments, *viz.*:

1. The statute punished mere loitering, its terms requiring only an existing mental state and no overt conduct. As a result, due process was violated by the effort to punish mere thought or intent.²

² The County Court decision inserted into the statute the requirement of "either an overt act or other conduct unambiguously evidencing the proscribed purpose." *Petition*, App. C, 6c. This still left it vague as to what kind of conduct would suffice to permit arrest and conviction.

2. The statute did not correlate the non-criminal conduct of loitering [*Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972)], on the one hand, with an objective which was a criminal offense or which the State could otherwise legitimately proscribe, on the other.³

3. As a result of the first two arguments, the statute provided no clear standards (a) to guide police, prosecutors and the courts in determining whether or not probable cause for arrest and conviction in particular situations existed and (b) to inform the citizen as to what conduct he had to eschew to avoid violation. The statute was, therefore, unconstitutionally vague. See *Papachristou v. City of Jacksonville*, *supra*.

4. The statute absolutely prohibited discreet, unobtrusive, noncommercial solicitation in a public place of sexual conduct to be performed in a private place. As a result, it

(a) impaired constitutional rights to freedom of association;

(b) impaired constitutional rights to freedom of speech.⁴

³ Respondent argued that the object of the loitering must either be a criminal act or an act relating to particular controlled premises [e.g. loitering in a transportation facility, Penal Law §240.35-6, 7; see *People v. Bell*, 306 N.Y. 110 (1953)] to meet due process standards.

⁴ Respondent also preserved the arguments [1] that the statute was overbroad (thereby permitting consideration of the vagueness argument concerning the proscription of loitering for "other sexual behavior of a deviate nature" and [2] that the statute violated the equal protection guaranty because of discrimination between homosexuals and non-prostitution related heterosexuals. These arguments assumed little importance on appeal. Contrast *Petition*, 12-13, which emphasizes the particular vagueness argument which was all but ignored by Respondent below.

The argument was additionally made by *amicus* briefs and orally before the Court of Appeals that the statute unconstitutionally created impediments to the exercise of another constitutional right, the right to privacy under the United States Constitution, declared by *People v. Onofre*, 51 N.Y.2d 476 (1980), *cert. den.* 451 U.S. 987 (1981).

The Decision Below

Noting that private homosexual behavior between consenting adults had been declared protected by the right of privacy in *Onofre, supra*, the Court of Appeals held that the present statute prohibited "conduct anticipatory to the act of consensual sodomy". Because that act was not criminal, there was no basis for the State to continue to punish loitering. In answer to the People's argument that the loitering was, *ipso facto*, an act of harassment which the Legislature could prohibit, the Court held that the statute could not be so justified in the absence of a requirement that the conduct be in fact "offensive or annoying to others". *Petition, App. B, 2b.*

ARGUMENT

POINT I

People v. Onofre correctly decided an important constitutional issue.

The Erie County District Attorney attempted unsuccessfully to obtain a writ of certiorari in *Onofre, supra*, 451 U.S. 987 (1981). He now alludes to the Court of Appeals' decision in *Uplinger* as being "an improper extension of an unfounded decision" (referring to *Onofre* by the latter description) [*Petition, 6, fn. 1*] and asks that this Court review the correctness of the *Onofre* holding on the consensual sodomy provision as well as the present holding on the proscription against loitering for purposes of deviate sex.

Inevitably, if this Court grants certiorari in *Uplinger*, it will be called on to address the fundamental question of *Onofre*: whether private, consensual, adult and non-commercial sex acts are protected by the federal constitutional right of privacy attaching to certain fundamental personal decisions and relationships. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973).

In *People v. Onofre*, *supra*, the New York Court of Appeals could find no objective harm to the public morals or welfare which would justify governmental prohibition of private, variant sex acts described in the statute as "deviate".

"In light of these decisions, protecting under the cloak of the right of privacy individual decisions as to indulgence in acts of sexual intimacy by unmarried persons and as to satisfaction of sexual desires by resort to material condemned as obscene by community standards when done in a cloistered setting, no rational basis appears for excluding from the same protection decisions—such as those made by defendants before us—to seek sexual gratification from what at least once was commonly regarded as 'deviant' conduct, so long as the decisions are voluntarily made by adults in a noncommercial, private setting." *People v. Onofre*, *supra*, 51 N.Y.2d at 488.

On a record developed in three separate prosecutions, involving both the public and private commission of variant sex acts, the Court of Appeals reversed all convictions and struck the statute down.

"Because the statutes are broad enough to reach noncommercial, cloistered personal sexual conduct of consenting adults and because it permits the same

conduct between persons married to each other without sanction, we agree with defendants' contentions that it violates both their right of privacy and the right to equal protection of the laws guaranteed them by the United States Constitution." *People v. Onofre*, *supra*, 51 N.Y.2d at 485.⁵

Onofre acknowledged the fact that what has in fact been upheld in the privacy decisions of *Griswold*, *Stanley*, *Eisenstadt* and *Roe* has been the right of the individual to make intimate decisions of how he would experience his sexuality, free of interference from the state, absent special factors justifying such interference.

"In sum, there has been no showing of any threat, either to participants or the public in general, in consequence of the voluntary engagement by adults in private, discreet, sodomous conduct. Absent is the factor of commercialization with the attendant evils commonly attached to the retailing of sexual pleasures; absent the elements of force or of involvement of minors which might constitute compulsion of unwilling participants or of those too young to make an informed choice, and absent too intrusion on the sensibilities of members of the public, many of whom would be offended by being exposed to the intimacies of others. Personal feelings of distaste for the conduct sought to be proscribed by section 130.38 of the Penal Law and even disapproval by a majority of the populace, if that disapproval were to be assumed, may not substitute for the required demonstration of a valid basis for intrusion by the

⁵ The Court of Appeals declined, on motion for reargument, to expand the ruling to include a finding of violation of the New York State Constitution's guarantees. 52 N.Y.2d 1072 (1981). Although the Court was not similarly specific as to the source of its ruling in the sequel decision of the *Uplinger* case, it made it plain that it was applying the same law as in *Onofre*. *Petition*, App. B, 2b.

State in an area of important personal decision protected under the right of privacy drawn from the United States Constitution—areas, the number and definition of which have steadily grown but, as the Supreme Court has observed, the outer limits of which it has not yet marked.” *People v. Onofre*, *supra*, 51 N.Y.2d at 490.

People v. Onofre was one of the more forthright of a growing number of decisions which have extended constitutional protection to private sexual conduct between consenting adults. See *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977); *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976); *Baker v. Wade*, 553 F.Supp. 1121 (1982). Cf. *Nemetz v. Immigration & Naturalization Service*, 647 F.2d 432 (4th Cir. 1981); *Lesbian Gay Freedom Day Committee, Inc. v. Immigration & Naturalization Service*, 541 F.Supp. 569 (N.D.Cal. 1982); *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal.3d 458, 156 Cal.Rptr. 14, 595 P.2d 592 (1979); *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980) [sodomy statute declared constitutionally infirm on equal protection grounds; privacy issue not reached]. See also, *Doe v. Commonwealth's Attorney*, 403 F.Supp. 1199, at 1205 n. 3 (Merhige, J; dissenting).⁶

⁶ Decisions denying the claim of constitutional protection include *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir. 1976), *cert. den.* 429 U.S. 977 (1976); *Wilson v. Swing*, 463 F.Supp. 555 (M.D.N.C. 1978); *State v. Santos*, 413 A.2d 58 (R.I. 1980); *Neville v. State*, 290 Md. 364, 430 A.2d 570 (1981); *State v. Elliott*, 89 N.M. 305, 551 P.2d 1352 (1976), later appeal, *State v. Elliott*, 89 N.M. 756, 557 P.2d 1105 (1977); *State v. McCoy*, 337 S.2d 192 (La. 1976). See, also, *United States v. Lemons*, 697 F.2d 832 (8th Cir. 1983), which declined to reach the privacy issue raised where the sex there involved occurred in public.

POINT II

If *Onofre* was correctly decided, the correctness of the decision below in *Uplinger* is beyond doubt.

But for the striking down of the consensual sodomy provision (Penal Law §130.38) in 1980, the Court of Appeals could not have struck down the loitering-for-deviate-sex law (Penal Law §240.35-3) in 1983. The fact that the object of the prohibited loitering was the commission of a criminal act would have been a complete answer to any challenge. *People v. Smith*, 44 N.Y.2d 613 (1978).

With the criminal nature of the object of the loitering removed, however, the decision in *Uplinger* became inevitable. Either the flat and unqualified prohibition of a person being in a public place with an intent (however fleeting or momentary) of soliciting someone to go home and engage in deviate sex was an unconstitutional impediment imposed on the attempted exercise of a constitutional right [compare *Carey v. Population Services Int'l*, 431 U.S. 678, 688 (1977) and cases there cited] or it was an impingement on the freedom of speech inherent in any solicitation communication. See *N.A.A.C.P. v. Button*, 371 U.S. 415 at 438-439 (1963); *Bigelow v. Virginia*, 421 U.S. 809 at 818 (1975); *State of Oregon v. Tusek*, 52 Ore. App. 997, 630 P.2d 892 (Ct. App. Ore. 1981). Similarly, to the extent that it seeks to prevent gay men from associating with other gay men in a public place if the proscribed purpose is in their minds at any time, it seeks to restrict their free right of association, without any requirement for the showing of any illegal act or objective. See *Sawyer v. Sandstrom*, 615 F.2d 311 (5th Cir. 1981); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

Moreover, the statute clearly violates the constitutional right to due process by stating its prohibitions in terms so vague as to prevent reasonable people from knowing what they must do to avoid violation and, further, by providing no clear guidelines to control police and judicial action in determining the existence of probable cause for arrest and conviction. A gay person in public, for example, is presumably innocent of violation of the statute while window shopping as he goes down the sidewalk; he arguably comes into violation of the statute the minute he sees another gay person who catches his fancy and forms the mental "purpose" of inviting that person home. A moment later, as he changes his mind, he is again a law-abiding person. When a fleeting state of mind, without more, can thrust one in and out of criminal status, the statute must be suspect as unconstitutionally vague.⁷ See *People v. Gibson*, 184 Col. 444, 521 P.2d 774 (Colo. 1974). The same should be said of this statute as was said in *Kolender v. Lawson*, _____ U.S. _____, 51 U.S.L.Wk. 4532 (5-2-83):

"Section [240.35-3], as presently drafted and construed by the state courts, contains no standard for determining what a suspect has to do in order to satisfy the requirement to [avoid violation of the provision as written]. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has [remained

⁷ This Court has no applicable judicial interpretation of the statute to rely upon, beyond the text of Section 240.35-3 itself. While the County Court attempted to avoid vagueness problems by a limiting judicial construction of the scope of the statute, albeit unsuccessfully [see *Petition*, App. C, 6c], that effort was not adopted by the Court of Appeals. The vagueness argument could have been eliminated by construing the statute as merely requiring an act of solicitation to justify arrest, but this was not done. See *Petition*, App. B, 9b-10b, Jasen, J. dissenting.

without] the provisions of the statute and must be permitted to go on his way in the absence of probable cause to arrest." *Ibid.* at 4534.

All that the Court of Appeals has done here is to hold that one may, in a public place, have a private conversation with friend or stranger, under circumstances where the invitation would not be anticipated to be offensive to the recipient, and invite that person home to do a legal act. Offensive behavior is already outlawed in New York under the disorderly conduct statute (Penal Law §240.20) and the harassment provision (Penal Law §240.25). What the State argues for is the right to legislatively declare that certain verbal acts constitute harassment in any and all circumstances and regardless how welcome the discreetly conveyed, although prohibited, invitation may be to the hearer.

The Court of Appeals, instead, has restricted the State to punishing actual offensiveness or actual harassment when the facts of the particular incident demonstrate the same. *Petition, App. B, 2b.*

The State cites no instance where the particular jurisdiction makes consensual sodomy lawful but makes unlawful the quiet, unobtrusive solicitation for the same. The cases cited at pages 10-11 of the Petition are all cases where the solicitation provision was either struck down or construed so narrowly that it could not be applied to the factual situation present in *Uplinger*—the discreet invitation, tendered in a public place, to come to a private residence to perform sex.

POINT III

The Court should deny the present petition unless it is ready at this time to review the underlying question presented by *Onofre*: whether the constitutional right of privacy extends to private, adult, consensual sexual conduct.

This Court has repeatedly declined opportunities to opine on the specific question presented by *Onofre*. See *Buchanan v. Batchelor*, 308 F.Supp. 729 (N.D.Tex. 1970), *rev'd on other grounds sub nom., Wade v. Buchanan*, 401 U.S. 989 (1971); *Doe v. Commonwealth's Attorney*, 403 F.Supp. 1199 (E.D.Va. 1975), *summary affirmance without opinion*, 425 U.S. 901 (1976); *New York v. Onofre*, 51 N.Y.2d 476 (1980), *cert. den.* 451 U.S. 987 (1981); *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir. 1976), *cert. den.* 429 U.S. 977 (1976); *Canfield v. Oklahoma*, 506 P.2d 987 (Okla. Cr. App. 1973), *dis. for want of substantial federal question*, 414 U.S. 991 (1973); *Pruett v. Texas*, 463 S.W.2d 191 (1971), *disim'd for want of substantial federal question*, 402 U.S. 902 (1971).

Criminal offense cases like *Onofre* and *Uplinger* squarely involve the issue and avoid ancillary problems of standing and justiciable case and controversy considerations, frequently present in civil cases like *Doe v. Commonwealth's Attorney*, *supra*.

Because the *Uplinger* result below hinges on the correctness of the predicate ruling in *Onofre*, this matter again presents the Court with an opportunity to clarify the constitutional law in this entire area. If the Court, as a matter of policy, wishes to now address that problem, affecting as it does millions of Americans who are homosexual, as well as heterosexual Americans potentially

subject to similar prosecution for variant sexual practices, it has that opportunity.

If, instead, the Court wishes to again pass the opportunity to deal with the predicate question, it should not grant certiorari on the *Uplinger* decision. That decision is eminently correct and not legally novel or controversial.

Conclusion

The petition should be denied, unless the Court wishes to address the underlying question whether private, adult, consensual and noncommercial sex falls within the protection of the right of privacy under the United States Constitution.

Dated: Buffalo, New York
May 13, 1983

Respectfully submitted,

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No. 82-1724

Office of the FILED JUL 5 1983 ALEXANDER L. STEVAS, CLERK

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ROBERT UPLINGER, SUSAN BUTLER,

Respondents.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK.

**BRIEF OF RESPONDENT SUSAN BUTLER
IN OPPOSITION TO PETITION
FOR CERTIORARI**

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i.

Questions Presented

Respondent Susan Butler adopts the questions as stated in the Brief of Respondent Robert Uplinger.

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Relevant Constitutional and Statutory Material

**UNITED STATES CONSTITUTION,
Amendments I, XIV**

[Please see Petition, page 2, for text.]

NEW YORK STATE PENAL LAW

Sections 240.35-3 (Loitering-for-the-purpose of deviate sex, etc.) and Section 130.38, (Consensual Sodomy). [Please see Petition, page 3, for text.]

Section 130.00 ("Sex offenses: definitions of terms"). [Please see Brief of Respondent Robert Uplinger, page iii.]

Section 240.37. (Loitering-for-the-purpose of prostitution).

"1. For the purposes of this section, 'public place' means any street, sidewalk, bridge, alley or alleyway, plaza, park, driveway, parking lot or transportation facility or the doorways and entrance ways to any building which fronts on any of the aforesaid places, or a motor vehicle in or on any such place.

"2. Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of prostitution, or of patronizing a prostitute as those terms are defined in article two hundred thirty of

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the penal law, shall be guilty of a violation and is guilty of a class B misdemeanor if such person has previously been convicted of a violation of this section or of sections 230.00 or 230.05 of the penal law.

"3. Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of promoting prostitution as defined in article two hundred thirty of the penal law is guilty of a class A misdemeanor."

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OFFICIAL AND UNOFFICIAL CITATIONS
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County Court, Erie County: *People v. Uplinger*, 113
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Buffalo City Court, Buffalo, N.Y.: *People v. Butler*,
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IN THE
Supreme Court of the United States

October Term, 1982

No. 82-1724

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER, SUSAN BUTLER,

Respondents.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK.

**BRIEF OF RESPONDENT SUSAN BUTLER
IN OPPOSITION TO PETITION
FOR CERTIORARI**

Summary of Respondent's Argument

Point I. *People v. Onofre*, 51 N.Y.2d 476 (1980), *cert. den.* 451 U.S. 987 (1981), ruled, *inter alia*, that the New York consensual sodomy statute, Penal Law Section 130.38, was unconstitutional as a violation of the equal protection of the laws, under the United States Constitution, due to its exemption of sodomy conduct from the prohibition when performed between spouses,

while criminalizing that conduct as to all others. Such decision was correct, and, on the basis of the equal protection argument (coupled with the privacy principle enunciated as an independent basis for the holding), provided a clear foundation for the striking down of the statute.

Point II. The *Onofre* decision by the New York Court of Appeals did not contravene any prior determination by this Court, despite the fact that four prior cases facially presenting sodomy privacy issues were summarily disposed of by the Court.

Point III. Given the foundation of the *Onofre* decision, the decision of the Court of Appeals in *People v. Uplinger* and *People v. Butler*, 58 N.Y.2d 936 (1983), was not only predictable but obligatory. The State of New York has not articulated any rational basis for a determination that the loitering-for-deviate-sex provision (Penal Law 240.35-3) should be upheld, notwithstanding the fact that the ultimate object of the loitering was legal and, when done in a private residence, constitutionally protected. Respondent's position results from the fact that the New York Legislature has failed, after *Onofre*, to enact any substitute provision specifically directed to public sex activity while also avoiding the pitfall of violation of equal protection rights.

The Court below has carefully and conservatively ruled in such a way as to preserve to the New York Legislature the power to vindicate any proper public purpose by enacting an appropriate statute designed to proscribe public solicitations for public sex or solicitations for private sex which are in some way actually offensive or harassing. By leaving it to the New York Legislature to determine what kind of proscription

present State authorities wish to impose, within constitutional bounds, the Court has carefully refrained from encroaching on proper legislative powers.

Point IV. Even if the Legislature fails to enact an appropriate substitute statute for either Penal Law Section 130.38 or Section 240.35-3, the State retains the power to charge and convict persons who it claims are engaged in prostitution activities (as claimed by the State below as to Susan Butler) under Penal Law Section 240.37, loitering for the purpose of prostitution. Accordingly, as to respondent Butler, the State has lost nothing by the effects of the decision below, except the opportunity to evade the reasonable and constitutionally appropriate proof requirements of the alternative statutory provision. As a result, the issues in this case, as they apply to Susan Butler, do not present sufficiently important public policy considerations to warrant this Court granting the application for certiorari.

Point V. If, however, the Court elects to grant the petition for certiorari, full argument and hearing of the matter should be provided for, in lieu of any summary determination of the issues. The extent of the power of the states to control private sexual practices among consenting adults, where there is no proof of commerce in sex, is a substantial, unresolved constitutional issue which affects large masses of people, both homosexual and heterosexual, and which needs to be fully reviewed and explicated for the benefit of litigants and courts dealing with the various challenges being made. Additionally, to the extent that the State attempts to uphold the loitering provision, notwithstanding the correctness of the constitutional holdings of *Onofre, supra*, this matter presents, as to the loitering or solicitation aspects only, an opportunity for a further

examination into the rights of the public to use the streets while retaining limited rights of privacy in public-place, but private, conversations with others. [Compare *Kolendar v. Lawson*, _____ U.S. _____, 51 U.S.L.Wk. 4532, No. 81-1320 (1983)].

ARGUMENT

POINT I

People v. Onofre correctly decided the constitutional issues of privacy and equal protection of the laws referred to therein and correctly concluded that the New York consensual sodomy law (Penal Law §130.38) was unconstitutional.

Respondent Butler respectfully refers the Court to Point I of the argument in the Brief of Respondent Robert Uplinger herein (pages 7-10) and adopts that argument for herself.

The *Onofre* decision was based on two alternative grounds: privacy and equal protection. *People v. Onofre, supra* at 485. Only the fact situation presented in Ronald Onofre's appeal directly involved the claim of privacy (although the other defendants argued privacy as well). *Onofre, supra* at 483-484. The remaining defendants were all convicted for alleged sodomous acts performed in motor vehicles on the public streets. *Onofre, supra* at 484. Accordingly, the Court of Appeals elected to rule both on the privacy issue and the equal protection issue, the latter ground being applicable whether the sex acts were in public or in private. (See *People v. Onofre, supra* at 485, note 2.) The decision was clearly correct on both grounds.

Privacy. Griswold v. Connecticut, 381 U.S. 479 (1965), first established the concept of the right of privacy, putting outside the ambit of state control bedroom decisions of married persons, touching the most intimate matters of their lives—whether to have children and how to regulate their sexual conduct with each other. *Id.* 483-485. In *Stanley v. Georgia*, 394 U.S. 557 (1969), the privacy right was recognized to exist with respect to the possession of pornographic materials in one's own home—the right here being based not on the nature of a relationship but on the locus of the activity, the citizen's private residence. *Id.* 564-565.

In *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Roe v. Wade*, 410 U.S. 113 (1973), this Court recognized that the right of privacy extends beyond matrimonial relationships or the private residence of the defendant to certain other important decisions involving sexual and other personal activity of individuals, married or unmarried, in whatever context the case may arise. These decisions are firmly grounded in constitutional history. See, e.g., *Boyd v. United States*, 116 U.S. 616 at 630 (1886), which originally recognized the applicability of the Constitution to protect "the sanctity of a man's home and the privacies of life"; *Union Pacific Railway Co. v. Botford*, 141 U.S. 250 at 251 (1891), emphasizing the "right to one's own person"; *Doe v. Bolton*, 410 U.S. 179 (1973), protecting "freedom of choice in basic decisions of one's life"; *Whalen v. Roe*, 429 U.S. 589 at 599-600 (1977), describing the right as "the interest in independence in making certain kinds of important decisions" and *Carey v. Population Services*, 431 U.S. 678 at 685 (1976), describing the right of privacy as a "field that by definition concerns the most intimate of human activities and relationships, [where] decisions whether to accomplish or prevent contraception are among the most private and sensitive".

The New York courts have properly recognized that, insofar as the right is upheld in cases involving contraceptives, abortion and private possession of pornography, the decisions are in fact upholding the private right of the individual to engage in certain sexual activities, free of the consequence of unwanted pregnancy or government interference. See *People v. Onofre*, *supra* at 488 (protection of "indulgence in acts of sexual intimacy"). There is no rational basis to exclude protection of the decision of what kind of non-harmful, consensual sex act to engage in (here, sodomy, as defined by New York Penal Law, Section 130.00-2) from the range of protection previously upheld by this Court. See *People v. Onofre*, *supra* at 488. Certainly, the experience of sex (quite apart from any rational decisions whether and when to have children) is itself a matter of extreme privacy and intimacy, falling well within the zone of privacy outlined by this Court in its earlier decisions. See Richards, "Sexual Autonomy and Constitutional Right to Privacy", 30 *Hastings Law Journal* 957, 1004-1005 (1979); *Baker v. Wade*, 553 F.Supp. 1121 at 1130 (N.D. Tex. 1982).¹

Equal Protection. Eisenstadt v. Baird, 405 U.S. 438 at 453-54 (1972), found it impossible to make a constitutionally permissible distinction between married people and single people in determining whether or not the right of privacy inhered with respect to sexual matters. Similarly, the Court of Appeals in *Onofre* (51 N.Y.2d, *supra*, at 491-494) found it impossible to distinguish between conduct of married people and single people with respect to the performance of sodomy.

¹ Note reference at page 1130 of the *Baker v. Wade* decision to the basic importance of sex to the individual, being, "next to hunger and thirst, . . . the most powerful drive that human beings experience".

Because the statute made that distinction, it was found to violate rights of equal protection.² The premise was clearly correct, as held by the Court of Appeals, and renders the statute lifeless, whether it would otherwise be applicable in a public or private setting. See, also, *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980); *Baker v. Wade*, *supra* at 1143-1144.

POINT II

The decision in *People v. Onofre* was not precluded by any prior determination of this Court on the merits, although four substantive rulings relating to privacy have occurred.

This Court has ruled substantively in four cases which facially presented the question of the constitutionality of state sodomy laws with respect to the right of privacy. The summary dispositions, however, while finally determining the cases for the litigants and implicitly deciding the questions necessary to be decided for that purpose [see *Mandel v. Bradley*, 432 U.S. 173 at 173-177 (1977); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 at 182-183 (1979)], did not reach the issues which were present in *Onofre*, either as to privacy or equal protection.

² Significantly, Judge Jasen, the lone dissenter in *People v. Uplinger*, below, concurred in the majority opinion in *Onofre* on the equal protection ground, while declining to go along with the majority's holding on the privacy issue. *People v. Onofre*, *supra* at 494. The equal protection argument, under which respondent Butler's acts would still be protected from the statute's impact, is, therefore, arguably even stronger than the personal privacy right argument, which would apply if the loitering charged against her had been for sex contemplated to occur in a private setting.

1. *Doe v. Commonwealth's Attorney for City of Richmond*, 403 F.Supp. 1199 (E.D. Va. 1975), *aff'd* 425 U.S. 901 (1976).

The District Court ruled on the civil declaratory and injunction action brought by two homosexuals suing anonymously to have the Virginia sodomy statute struck down as a violation of their privacy. The District Court held that the statute was constitutional. This Court's summary affirmance was undoubtedly based on applicable justiciability problems involving case and controversy issues and may, further, have been based on standing and abstention issues.³ See *Younger v. Harris*, 401 U.S. 37, 41-42 (1971) and *Boyle v. Landry*, 401 U.S. 77 (1971). See also *Samuels v. Mackell*, 401 U.S. 66 (1971). Compare *Wade v. Buchanan*, 401 U.S. 989 (1971), vacating and remanding judgment in *Buchanan v. Batchelor*, 308 F.Supp. 729 (N.D.Tex. 1970), particularly as the claims of the intervenors in the lower court case were affected. See, also, *People v. Onofre*, *supra* at 493-494; *Baker v. Wade*, *supra*, 553 F.Supp. at 1136-1138.

2. *Pruett v. Texas*, 463 S.W.2d 191 (1971), *dis.* 402 U.S. 902 (1971) [Docket No. 1390, Oct. Term, 1970].

Pruett pleaded guilty to violation of the Texas statute outlawing sodomy,⁴ applicable whether the act was by force or consent and whether done in public or in private. The offense was committed by force at a detention school, with the record being silent as to whether or not

³ "Standing" questions involve not only policy issues of self-restraint by this Court in adjudicating constitutional issues. They are also integrally related to jurisdictional questions under the cases and controversies provision of the Constitution. See *Barrows v. Jackson*, 346 U.S. 249 at 255 (1953).

⁴ Texas Penal Code, Article 524, Acts 1860; Acts 1943, 48th Leg., p. 194, ch. 112, Sec. 1.

it occurred in private. The questions presented in Pruett's papers to this Court all related to whether or not the Texas court was bound by the prior decision in *Buchanan v. Batchelor*, *supra*, 308 F.Supp. 729, the appeal from which was then pending before this Court. [See Pruett Juris. St. at 3-4; see, also, Motion to Dismiss at 2, asserting that Pruett's "sole contention" before this Court was based on the allegedly binding nature of the District Court ruling in *Buchanan v. Batchelor*, *supra*, over the Texas court.]⁵

3. *Canfield v. Oklahoma*, 506 P.2d 987 (Okla. Cr. App. 1973), *dis.* 414 U.S. 991 (1973) [Docket No. 72-6799, Oct. Term, 1973].

Canfield was charged with violation of the Oklahoma sodomy statute, which outlawed commission of the "detestable and abominable crime against nature", again without regard to whether the act was done in public or private. Okla. Stat. Ann., 21 O.S. 886. The act was committed in a motor vehicle approximately 100 yards off the public road. *Canfield v. Oklahoma*, *supra*, 506 P.2d at 988. Canfield, among other arguments to this Court, urged that the statute violated his right to privacy. [See Canfield Juris. St. at 2, Question No. 3.]

4. *State v. Poe*, 40 N.C.App. 385, 252 S.E.2d 843 (1979), *cert. den.* 298 N.C. 303, 259 S.E.2d 304 (1979), *dis. sub nom. Poe v. North Carolina*, 445 U.S. 947 (1980) [Docket No. 79-5877, Oct. Term, 1979].

Poe was convicted of violating North Carolina's statute outlawing commission of the "crime against nature", applicable whether the act was in public or in private. N.C.G.S. 14-177. The act took place between Mr. Poe and a woman in an abandoned warehouse where they went

⁵ The *Buchanan v. Batchelor* decision was subsequently vacated and remanded by this Court. See *Wade v. Buchanan*, 401 U.S. 989 (1971).

for that purpose. The record contains no information indicating that the warehouse was not equally as accessible to other members of the public, as it was to Poe and his companion. [See Poe Juris. St. at 2-3.] The sole question presented on the appeal to this Court was whether Poe's right to privacy under the Constitution was violated. [Poe Juris. St. at 2.]

Whereas the *Doe* case was one of summary affirmance of a lower federal court determination, the other three cases all resulted in unexplicated dismissals by this Court for want of a substantial federal question.

None of the earlier cases presented the issues of equal protection under a statute, like New York's, which distinguished facially between permitted and prohibited sex acts between married persons, on the one hand, and unmarried persons, on the other. Clearly, this Court's dismissals did not constitute determinations of the constitutional issue of equal protection, although that was one of the two independent grounds relied upon by the *Onofre* court. *People v. Onofre*, *supra* at 485.

The correct method of constitutional adjudication, where possible, is to limit the adjudication to the statute as applied in a given situation. *Lovelace v. United States*, 357 F.2d 306 at 309 (5th Cir. 1966); *Gibbs v. Blackwell*, 354 F.2d 469 at 471 (5th Cir. 1965); *Sims v. Baggett*, 247 F.Supp. 96 at 101-102 (M.D. Ala. 1965). Moreover, this Court normally will not determine constitutional rights of parties not before the Court on the argument of others whose conduct did not come within the scope of those rights. *Broadrick v. Oklahoma*, 413 U.S. 601 at 610-11 (1973). The facts in none of the earlier cases presented to this Court would bring those litigants within one of the exceptions to the *Broadrick* rule. *Id.* at 611, *et seq.*

Finally, the precedents established by summary dispositions by this Court must be limited to the holding which "was essential to sustain" the judgment appealed from. *Illinois State Board of Elections v. Socialist Workers Party*, *supra* at 183. And the precedential significance of the dismissal is to be evaluated "in the light of all of the facts in that case". *Mandel v. Bradley*, *supra* at 177.

Accordingly, the teaching of the earlier cases is limited, respondent suggests, to the following:

1. Homosexual plaintiffs, living anonymously and under a generalized fear of arrest and prosecution, but with no demonstrably justifiable fear of the same, have no standing to raise the constitutionality issue in a civil action in federal court; if, however, there was imminent fear of arrest and prosecution under a state sodomy statute, *Younger* and *Boyle* abstention problems would generally preclude civil litigation of the issue. *Doe v. Commonwealth*, *supra*.

2. The constitutional right of privacy does not extend to protect one who commits the act of sodomy by force and in an institutional setting where the record does not clearly demonstrate "cloistered", residential privacy interests. *Pruett v. Texas*, *supra*.

3. Alternatively, the Texas state court was not bound by the three-judge District Court decision in *Buchanan v. Batchelor*, *supra*, because (a) they are coordinate courts and (b) the Federal Court decision was subsequently vacated by the Supreme Court and remanded. *Pruett v. Texas*, *supra*.

4. The constitutional right of privacy does not extend to protect one who commits the act of sodomy in a public place in an automobile [*Canfield v. Oklahoma*, *supra*] or in an abandoned warehouse

which, while out of view of others who are not present, is nonetheless accessible to them, as well, and without the privacy protections accorded to private residences. *Poe v. North Carolina*, *supra*.

People v. Onofre, *supra*, however, expressly relied (as to the privacy aspect of the ruling) on the fact that the act of Onofre occurred in his own private residence. The Court of Appeals emphasized, particularly, *Stanley v. Georgia*, 394 U.S. 557 (1969) [see *Onofre*, *supra* at 487]. The privacy right went so far as to protect "satisfaction of sexual desires by resort to material condemned as obscene by community standards *when done in a cloistered setting*" [*Onofre*, *supra* at 488; emphasis added; see, also, reference to the "cloistered personal sexual conduct of consenting adults" at page 485]. In *Poe*, by contrast, the asserted right to privacy was in a fact context where, although the evidence tended to show that the act was "done in private" [*State v. Poe*, *supra*, 252 S.E.2d at 843], there was no indication that either of the participants had any special rights to use of the premises or that others did not have equal access thereto. *Poe* appeared to be arguing as a trespasser of the warehouse premises. This Court would surely not extend to *Poe*'s abandoned warehouse the constitutional right of possession of obscene materials which would have been accorded to him in his own home. *Cf. Stanley v. Georgia*, *supra*.

The conclusions stated here are supported by this Court's comments in *Carey v. Population Services*, 431 U.S. 678 (1977) (decided after all of the above decisions except *Poe v. North Carolina*, *supra*) to the effect that the Court had not yet answered definitively the "difficult question" of the extent of constitutional protection available to private consensual sexual behavior of adults. *Id.* at 688, n. 5 and at 694, n. 17. Six justices of the

Court seemingly accepted this statement of the situation [see analysis at *Baker v. Wade, supra*, 553 F.Supp. at 1138], with the dissent expressly stating the contrary view [see *Baker v. Wade, id.*, n. 46].

The New York Court of Appeals was free to consider the issues in *Onofre* on the merits. Its decision striking down the statute in its entirety accorded to respondent Butler in her subsequent prosecution the right to a dismissal of the dependent loitering charge.

POINT III

There is no rational basis to reverse the Court of Appeals' holding in *Uplinger-Butler*, below, once the correctness of *Onofre* is recognized.

Respondent adopts the argument of respondent Uplinger in his Brief on this matter (Uplinger Brief, pages 11-13). Respondent further urges that the dissent of Judge Jasen in the Court of Appeals' decision (Petition, 3b-12b) fails to raise substantial arguments to the contrary.

First, the fact that the statute was "designed to protect persons from being harassed" [Petition, 3b] begs the question. It is the fact that no proof of harassment or annoyance was required that makes the loitering law, with its First Amendment implications of free speech and assembly, invalid in the first place. The majority clearly reserves to the Legislature the power to enact an appropriately limited statute to meet any risk of harassment or offensiveness (Petition, 2b-3b). The Legislature's right to "regulate public conduct" [Petition, 3b], however, is not unlimited simply because the conduct is in public; the First, Fifth and Fourteenth Amendment protections must be adhered to.

Whether or not Judge Jasen has correctly characterized respondent Butler's conduct [see Petition, 7b], the claimed policy interests of the State, with respect to her and others in similar circumstances, can be fully vindicated by prosecution under Penal Law, Section 240.37, or by prosecution under new legislation which the Legislature could pass controlling public sexual activity.

The fundamental flaw in the dissent's position, however, is the assertion that there was "no necessity that the statute require the conduct proscribed to be offensive or annoying to others" and that it is enough if the Legislature determine "that public solicitation to engage in sexual conduct is necessarily offensive to others" (Petition, 5b). Respondent submits that a mere legislative finding as to the offensiveness of public solicitation has never, without more, been enough to support the statute and avoid constitutional implications.⁶ That a more restricted legislative structure is required, and that it is possible to establish, is demonstrated by limiting statutory constructions adopted in analogous situations by California [*Pryor v. Los Angeles Municipal Court*, 25 Cal.3d 238 at 256-257, 599 P.2d 636 at 647 (1979)] and Massachusetts [*Commonwealth v. Sefranka*, _____ Mass. _____, 414 N.E.2d 602 at 608 (1979)].

⁶ One could argue, for example, that religious solicitation or street preaching is frequently actually offensive to other users of the public streets. While sexual solicitation would undoubtedly not enjoy the degree of protection that public preaching and solicitation of alms would, the context is critical. What was the relationship, if any, of the parties? Who was present who could be anticipated to be offended or alarmed? What time of day or night was it? Where did the contact occur as among relative public places—on a crowded subway or in a remote, unpopulated, albeit technically public area. As with all sexual communications, there is ample room for reasonable regulation of conduct [compare *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 at 750-751 (1978)].

The argument of the dissenter below that overbreadth has necessarily been relied upon and erroneously utilized is incorrect. The basic holding of the majority was that since the consensual sodomy law was no longer in force and, as a result, the "purpose of engaging . . . in deviate sexual intercourse" [N.Y. Penal Law §240.35-3] was no longer unlawful, there was no basis for upholding a statutory prohibition against solicitation for that lawful act, where the prohibition incorporated no requirement of proof of the manner in which the solicitation was made (Petition, 2b). Overbreadth, as an argument, was not a necessary foundation to that holding, as clearly stated by the majority (Petition, 2b-3b).

Finally, it should be noted that the Court below has carefully and conservatively preserved to the Legislature the power to enact appropriate safeguards against offensive public sexual conduct, whether of performance of sex or solicitation therefor. See *People v. Uplinger-Butler*, Petition, 2b-3b; *People v. Onofre*, *supra*, 51 N.Y.2d at 490.

POINT IV

Even if the New York Legislature fails to take the opportunity to frame new statutory provisions regulating sexual conversation or public action in constitutionally acceptable terms, persons alleged to be in the position of respondent Butler will be subject to prosecution under Penal Law §240.37; the State has, to that extent, lost nothing by the decision below.

New York Penal Law, Section 240.37, prohibits loitering for the purpose of prostitution [see text at "Relevant Statutes", *supra*]. The statute carefully prescribes standards to guide the police officer,

prosecutor and court in the handling of such situations. It has been upheld by the New York Court of Appeals. *People v. Smith*, 44 N.Y.2d 613 (1978). As to the alleged conduct of respondent Butler, therefore [see Jasen, J., dissenting, Petition at 7b], the present Petition presents a frivolous issue, not sufficiently substantial in its impact on the State of New York to warrant review by this Court. If the only case here involved were that of respondent Butler, it would be clear that this Court should not grant the certiorari application.

POINT V

If, however, this Court elects to grant the certiorari application, opportunity should be accorded to the parties for full briefing and argument, due to the important and far-reaching impact of any decision this Court would render.

Respondent submits that this is an important case, as evidenced by the extent of litigation it has engendered [see Uplinger Brief, 10, 14], the numbers of people potentially affected by statutes similar to New York's consensual sodomy law [Penal Law §130.38] and loitering law [Penal Law §240.35-3]⁷ and the fundamental liberty issues involved. This is not a case where the issues are presented in a procedural context [cf. *Doe v. Commonwealth's Attorney, supra*] or factual context [cf. *Pruett v. Texas, supra*, *Canfield v. Oklahoma, supra*, and

⁷ New York's statutory provisions apply to males and females, homosexual and heterosexual conduct. In the social atmosphere of the 1980's, it is clear that the conduct sought to be prohibited involves sex acts and overt or subtle communications of literally millions of people. Compare *Baker v. Wade, supra* at 1129, dealing with a Texas statute directed at such conduct by homosexuals only and very large numbers of persons affected by the prohibitory scheme.

Poe v. North Carolina, supra] which would warrant summary disposition of the issues before this Court on the merits. If the Court deems the matter important enough to justify the grant of the certiorari writ, respondent urges that the appeal be handled thereafter in a full, plenary manner, which will adequately clarify the issues for the guidance of lower courts, prosecutors and defense counsel in the handling of future consensual-sex criminal issues.

Conclusion

The petition for certiorari should be denied. If the Court grants the requested writ, full argument and briefing of the issue is warranted.

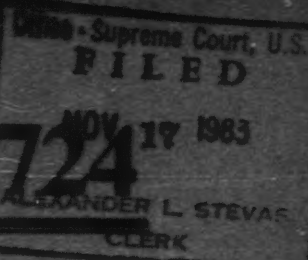
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In The
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER and SUSAN BUTLER,

Respondents.

ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Where public solicitations to engage in deviate sexual acts are either unprotected or only minimally protected by the First Amendment to the Constitution, and where the State has a compelling interest in the protection of its citizenry from public invitations to engage in abnormal sexual behavior which have been legislatively perceived as annoying or harassing, does New York Penal Law §240.35 subd. 3 which prohibits loitering for the purpose of engaging or soliciting another to engage in deviate sexual intercourse or other deviate sexual activities represent a constitutionally valid exercise of the State's power to control public order?

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In The
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER and SUSAN BUTLER,

Respondents.

**ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS**

BRIEF FOR PETITIONER

The Erie County District Attorney, on behalf of the People of the State of New York, seeks reversal of a judgment of the New York State Court of Appeals. By that judgment, a divided Court of Appeals (6-1) reversed a judgment of the Erie County Court which had affirmed the conviction of Robert Uplinger for Loitering for Deviate Sexual Purposes (New York Penal Law §240.35 subd. 3) and reversed the dismissal of a charge against Susan Butler under the same section.

OPINIONS BELOW

The memorandum decision of the New York State Court of Appeals (App. B, 1b-13b)¹ is reported at 58 N.Y.2d 936, 460

¹References to appendices A, B, C, D and E are to the appendices to the petition for a writ of certiorari.

N.Y.S.2d 514, 447 N.E.2d 62 (1983). The memorandum and order of the Erie County Court (McCarthy, J.) dated May 3, 1983 (App. C, 1c-8c) is reported at 113 Misc.2d 876, 449 N.Y.S.2d 916 (County Court, Erie County, 1982). The memorandum and order of Buffalo City Court (Drury, J.) with respect to Respondent Uplinger dated November 9, 1981 (App. D, 1d-14d) is reported at 111 Misc.2d 403, 444 N.Y.S.2d 373 (Buffalo City Court, 1981). The memorandum and order of Buffalo City Court (Drury, J.) with respect to Respondent Butler dated September 8, 1981 (App. E, 1e-8e) is reported at 110 Misc.2d 843, 443 N.Y.S.2d 40 (Buffalo City Court, 1981).

JURISDICTION

The judgment of the New York State Court of Appeals was entered on February 23, 1983 (App. A). The petition for a writ of certiorari was filed on April 22, 1983, and this Court granted the petition by order dated October 3, 1983. The Petitioner sought review not only with respect to New York's Loitering statute (Penal Law §240.35 subd. 3), but also requested review with respect to the validity of New York's Consensual Sodomy statute (Penal Law §130.38) and the earlier New York Court of Appeals decision in *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), which held such statute to be unconstitutional. Since this Court denied certiorari in the *Onofre* case, 451 U.S. 987, 101 S.Ct. 2323, 68 L.Ed.2d 845, and since the order granting certiorari herein is silent with respect to any willingness on the part of the Court to review the issue litigated in *Onofre*, petitioner does not specifically deal with the validity of that statute or the propriety of that decision.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW YORK STATE PENAL LAW

§240.35 Loitering

A person is guilty of loitering when he:

3. Loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature; . . .

Loitering is a violation.

STATEMENT OF THE CASE

PEOPLE V. UPLINGER

Respondent Robert Uplinger was arrested on August 7, 1981 for the offense of Loitering pursuant to New York State Penal Law §240.35 subd. 3 (103-105)².

Officer Steven Nicosia, assigned to the Bureau of Vice Investigation of the Buffalo Police Department, was working undercover in the vicinity of 140 North Street in the City of Buffalo, New York (104). While in the area, characterized as a quiet residential neighborhood (33, 45), Nicosia was approached by Uplinger, who engaged the officer in conversation (104). In the course of the conversation a group of individuals, including Nicosia and Uplinger, who had congregated on the steps of 140 North Street, were ordered to disperse by other police officers. As Nicosia walked away, he was pursued by Uplinger, who asked whether Nicosia wanted to come to his apartment. Nicosia responded in the negative. The encounter, which lasted approximately ten minutes, was continued by Uplinger even though Nicosia indicated that he was afraid of the police and wanted to leave. In spite of these apparent attempts to discourage any further contact, Uplinger offered:

"Well if you drive me over to my place or go over to my place I'll blow you." (104)

Uplinger was thereafter placed under arrest for a violation of Penal Law §240.35 subd. 3 (105).

A hearing was held to elicit facts regarding a variety of considerations, including the character of the neighborhood where these acts were alleged to have taken place. At the hearing, it was determined that residents were apprehensive about walking in the neighborhood, particularly past groups of homosexuals (22, 35), and had been inconvenienced by the sounds of idling cars and indiscreet conversations (35, 48, 51). Individuals waiting for the bus had been propositioned for

²Numbers in parentheses refer to pages of Joint Appendix.

homosexual acts (50). A city councilman, who was parked in the neighborhood waiting for his son, was solicited by a male prostitute (51-52). Of concern was the connection between homosexual encounters and prostitution activities (43, 98-102). It was stated by a vice officer that the displacement of homosexual prostitutes from one area of the city resulted in their relocation to North Street where homosexual activity already flourished (102).

After the hearing and non-jury trial, Buffalo City Court Judge Timothy J. Drury denied respondent's motion to dismiss the accusatory instrument on the ground that the statute was unconstitutional and found respondent guilty as charged. Uplinger was sentenced to pay a fine of \$100.00.

PEOPLE V. BUTLER

Respondent Susan Butler, a known prostitute, was arrested on April 1, 1981 for the offense of Loitering pursuant to New York State Penal Law §240.35 subd. 3 (1-2).

The arrest occurred after Officer Kenneth Burgstahler, assigned to the Bureau of Vice Investigation of the Buffalo Police Department, observed Butler for a period of approximately ten minutes during which time she was seen waving at passing cars and attempting to stop three or four vehicles (3). At one point she engaged in a conversation with the driver of an automobile and, after two or three minutes, entered the automobile. When the vehicle backed down a side street, Burgstahler circled the block, located the car and observed the respondent committing an act of oral sodomy on the driver. Both participants were thereafter arrested for loitering to commit a deviate sexual act (2).

Respondent entered a plea of not guilty and a hearing was thereafter held with respect to her motion to dismiss the accusatory instrument on the ground that the statute was un-

constitutional. By an undated memorandum and subsequent order dated October 8, 1981, Buffalo City Court Judge Timothy J. Drury granted respondent's motion and dismissed the charge.

THE APPEALS

Appeals from each of the determinations were properly taken to the County Court of Erie County. In a memorandum and order applicable to both cases dated May 3, 1982 (App. C), Erie County Court Judge Joseph P. McCarthy affirmed the conviction of Respondent Uplinger and reversed the determination with respect to Respondent Butler, reinstating the charge. Leave to appeal to the New York Court of Appeals was granted. Respondents claimed on appeal that their right to due process and their freedoms of speech and association had been violated. The New York Court of Appeals found the statute to be unconstitutional.

JUDGMENT BELOW

In a memorandum decision, a divided New York Court of Appeals (Jasen, J., dissenting) summarily held that New York's Loitering statute (Penal Law §240.35 subd. 3) was unconstitutional. The holding was based upon the court's earlier decision in *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), cert. den. 451 U.S. 987, 101 S.Ct. 2323, 68 L.Ed.2d 845, which had determined New York's Consensual Sodomy statute (Penal Law §130.38) to be unconstitutional. Having previously ruled that the State could not constitutionally prohibit sexual behavior conducted in private between consenting adults, the court thus concluded that it could not prohibit public acts anticipatory to such conduct.

Although the Court of Appeals noted that the Legislature could have prohibited an individual from accosting another in an offensive manner or an inappropriate place, or could have

prohibited the solicitation of an act to be performed in public, the absence of some requirement of intent on the part of the solicitor or annoyance on the part of the solicitee rendered the statute defective. In conceding the ability of the Legislature to enact such a statute, the court acknowledged the compelling state interest to be served by such legislation.

Despite an explicit disavowal by the majority that its decision was based upon constitutional overbreadth considerations, the dissent, in a thorough and well-reasoned opinion, concluded that such could be the only basis on which the majority decision was founded. The lone dissenter, Judge Jasen, claimed that the majority failed in its judicial obligation to employ the overbreadth doctrine only sparingly and only when a limiting construction is unavailable. By utilizing the doctrine, the majority accorded First Amendment protection to the respondents' public solicitations and declined to limit the application of the statute.

Judge Jasen, although concurring with the majority in *Onofre, supra*, split from his brethren in the present case and noted that the earlier decision "in no way limited the Legislature's ability to regulate public conduct, at best anticipatory to later private conduct." (App. B, 3b). He clearly recognized the ability of the Legislature to enact such a statute and the rational basis therefor.

Also rejected was a claim of vagueness since, in the dissenter's view, the statute gives a person of ordinary intelligence fair notice of what is forbidden. In essence, the dissent concluded that the statute represented a valid exercise of the legislative power of the State and did not impermissibly infringe upon any protected rights.

SUMMARY OF ARGUMENT

In promulgating Penal Law §240.35 subd. 3, the New York State Legislature was attempting to safeguard the public order by prohibiting public loitering for the purpose of engaging in or soliciting another to engage in deviate sexual activity. As indicated by the testimony in the proceedings below, such street solicitations not only cause affront to unreceptive solicitees, but are a source of concern to parents whose children are indiscriminately solicited and business proprietors who feel that the presence of persons soliciting deviate sexual activities creates an atmosphere of intimidation detrimental to their interests.

Based upon an analysis of both the content and the context of the speech at issue, it is argued that such speech is not entitled to the protection normally accorded by the First Amendment. The speech at issue, undeniably lewd, bears no relationship to the active exposition and exchange of ideas sought to be nurtured by the free speech provisions of the Constitution, nor do the circumstances of such speech, i.e. that it is forced upon another in a public place, provide a basis for any form of protection.

In the event that such speech is accorded some degree of protection by this Court, it is asserted that the State's compelling interest in preventing the harm caused by public solicitation for deviate sexual activity is adequate to justify the regulatory statute under consideration. The First Amendment safeguards more than the right of one to say, publish or distribute what he wishes; it protects, as well, the right of one to choose what he wishes to hear or not hear. Although the offending language is uttered in a public place, both the unwilling solicitee and the unwilling bystander are unable to escape the potential assault upon moral sensibilities that the speech under consideration represents. Inasmuch as the State has a valid purpose in preventing acts of harassment and indiscriminate

intrusion upon the privacy of its citizenry, it has a legitimate interest in exercising its authority to regulate such behavior.

The State has an equally compelling interest in safeguarding the well-being of its children, some of whom are inevitably involved either as objects of solicitation or as solicitors. Prohibition of solicitation serves, albeit in different ways, to protect both groups of minors.

Lastly, the State's interest in regulating activities which constitute a public nuisance is also compelling when measured against the effects of such solicitation upon the community. Manifest is the apprehensiveness of both residents and business invitees who hesitate to utilize public accessways overtaken by congregating solicitors. Exacerbating the harm caused by solicitation is the fact that such solicitation often coincides with other criminal activity, in particular male and female prostitution.

It is contended that the New York statute in no way abridges the right of any persons to associate freely with others. There are many and diverse alternatives to public solicitation which are protected by the Constitution. Such alternatives are broad enough to permit the identification of persons who would be receptive to a private solicitation, thereby minimizing the potential harm to both solicitee and passerby of an indiscriminate public solicitation. Accordingly, the statute at issue can clearly exist without derogation of any individual's legitimate right to associate with others.

Due to the close relationship between the language of the statute and the State's permissible objective in protecting the public order, and further due to the absence of a substantial infringement upon protected activity, the statute cannot be termed overbroad. Nor is it underinclusive merely because it fails to regulate solicitation for normal sexual intercourse in the same manner as solicitation for deviate sexual acts, in view of the rational state purpose in delineating such classifications and

the unprotected nature of public sexual solicitations in general. - Finally, because the conduct of the respondents was unquestionably embraced by the clear language of the statute, they should not be heard to argue that said statute is void for vagueness.

POINT

New York State Penal Law Section 240.35 subd. 3 represents a valid exercise of the State's power to control public order.

Introduction

Under the Laws of 1965, the New York Penal Law, effective September 1, 1967, included under Article 240, Offenses Against Public Order, Section 240.35 subd. 3:

Loitering

A person is guilty of loitering when he:

* * *

3. Loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature;

* * *

Loitering is a violation.

The statute, directed specifically against public behavior, proscribes both loitering for the purpose of soliciting and loitering for the purpose of engaging in deviate intercourse or other deviate sexual behavior.

"Deviate sexual intercourse" is defined by §130.00 subd. 2 of the New York Penal Law as sexual contact between persons not married to each other consisting of contact between the penis and anus, the mouth and penis, or the mouth and vulva.

"Other sexual behavior of a deviate nature," although not statutorily defined, is by common usage understood as sexual conduct "characterized by or given to significant departure from the behavioral norms" of society. (*Webster's Third New International Dictionary of the English Language, Unabridged*, 14th ed., (1961), s.v. "deviate.")

The New York Court of Appeals concerned itself exclusively with the proscription against loitering for the purpose of soliciting one to engage in deviate sexual intercourse. The court concluded, based upon its decision in *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 414 N.E.2d 936 (1980), cert. den. *New York v. Onofre*, 451 U.S. 987, 101 S. Ct. 2323, 68 L.Ed.2d 845 (1981), which decriminalized deviate sexual intercourse carried on in private by consenting adults, that the conduct contemplated by Penal Law §240.35 subd. 3 could not be deemed criminal and thus, was not subject to the State's regulation.

What the court ignored in its assessment of the purview of the statute is that in addition to deviate sexual intercourse, the statute contemplates loitering for purposes relating to "other" distinctive conduct of a "deviate sexual nature," certain incidents of which *have* been deemed criminal by the Legislature. Such conduct obviously includes acts of bestiality and necrophilia (see Penal Law §130.20 subd. 3), acts involving the insertion of a foreign object into the vagina, urethra, penis or rectum (see Penal Law §130.70), acts of sexual sadism or masochism (see Penal Law §§120.00, 120.05 and 120.10 dealing with assault; see also Penal Law Article 130 specifically as it deals with offenses against those who are unable to consent due to age or mental deficiency), all unquestionably "deviate" by any definition.

In the discussion that follows relative to the purpose and intent of the Legislature and the interest of the State sought to be protected, it is recognized that Penal Law §240.35 subd. 3 is

concerned with loitering for purposes of participating in or soliciting another's participation in criminal as well as non-criminal acts.

First Amendment Protection

It is asserted that the New York State prohibition of public loitering for the purpose of soliciting or engaging in deviate sex (New York Penal Law §240.35 subd. 3) represents, both on its face and in its application, a valid exercise of state power to control public order. Undeniably, if a statute of this nature involves a restraint on speech which is protected by the First Amendment, it must be closely scrutinized to determine whether the State's interest in regulation is sufficiently compelling to overcome generalized First Amendment protections. *Young v. American Mini-Theatres*, 427 U.S. 50, 57, 96 S.Ct. 2440, 2446, 49 L.Ed.2d 310, 318 (1976). If, however, the speech is not protected, a less stringent standard, based upon the State's power to protect the well-being and tranquility of the community, can be employed. Within precise constitutional limitations, a state or city may prohibit acts or things reasonably thought to bring evil or harm to its people. *Kovacs v. Cooper*, 336 U.S. 77, 83, 69 S.Ct. 448, 451, 93 L.Ed. 513, 520 (1949).

The solicitations prohibited by the statute are not of a nature sought to be safeguarded by the Constitution. Under the First Amendment, protection is extended to the "communication of ideas or the discussion of issues." *Kovacs v. Cooper*, 336 U.S., at 89, 69 S.Ct., at 454, 93 L.Ed., at 523. A statement or activity, if it is to be entitled to protection, must bear some relationship to the freedom to speak, write, print or distribute information or opinion. *Schneider v. New Jersey*, 308 U.S. 147, 160-161, 60 S.Ct. 146, 150, 84 L.Ed. 155, 164 (1939). The First Amendment, according to Mr. Justice Holmes, guarantees liberty of human expression in order to preserve in

our Nation a free trade in ideas. *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173, 1182 (1919) [dissenting opn].

The speech at issue, which by any community standard would be termed lewd if not obscene, cannot be termed a statement of opinion, an exposition of ideas, or a delineation of issues, but is rather a mere invitation to another to engage in an intimate, abnormal sexual act. Its content is of "such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1034 (1942).

Whereas, in *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), the Court concluded that the four-lettered sexually explicit epithet emblazoned on the defendant's jacket was a political statement which was neither erotic nor psychically stimulating, the speech here under litigation has as its sole purpose a consummation of sexual interests. The words themselves are not only wholly erotic but act to conjure up thoughts which are exclusively sexual.

In truth, as the record herein supports, much of the communication regulated is connected with or an integral part of the crime of prostitution. As such, it is entitled to absolutely no constitutional protection.

"... it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S.Ct. 684, 691, 93 L.Ed. 834, 843-844 (1949).

Even were it to be assumed for purposes of discussion that in some cases the content of the solicitation under question is

protected to some degree, the context in which the words are uttered, i.e. public areas, prohibits the invocation of the First Amendment. As noted by the dissenting opinion in the Court of Appeals below, the focus of the statute is on public order; its intent is to prohibit an offensive accosting of another in the public forum. Not only is the solicitee exposed to a suggestion whose content is both intimate and lewd, but the circumstances are such that he cannot avoid the affront which such solicitation presents. The situation is similar to that described by the court in *Kovacs*:

"The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it [H]e is practically helpless to escape this interference with his privacy . . . except through the protection of the municipality." *Kovacs v. Cooper*, 336 U.S., at 86-87, 69 S.Ct., at 453, 93 L.Ed., at 522.

As recognized by the drafters of the Model Penal Code who recommended a statute almost identical to the one at issue:

"The rationale for retaining this offense is not the regulation of private morality but the suppression of public nuisance. Persons who publicly seek or make themselves available for deviate sexual relations openly flout community standards. Moreover, indiscriminate solicitation in public streets, parks and transportation facilities is not only an affront to moral and aesthetic sensibilities; it is also a source of annoyance to, and harassment of, members of the public who do not wish to become involved. Section 251.3 is designed to protect the legitimate expectations of citizens in public places by proscribing this kind of annoying activity. For that reason the offense is not limited to loitering for hire, as is the case under Section 251.2 on prostitution." (Model Penal Code, §251.3, Comment, at p. 476).

Consideration should also be given to the fact that a reckless or indiscriminate public solicitation can elicit a response more volatile than mere embarrassment or offense. The person solicited is forced to publicly respond, even if only by an abrupt

avoidance of the solicitor. The public aspect of such a solicitation could escalate the degree of discomfort or agitation experienced by a solicitee beyond that which presumably would be experienced in a private setting. Violence or public disorder adversely affecting not only the participants but those in the vicinity of the solicitation as well, is but an extreme of the harm which could result from the public context of the solicitation.

The solicitations engaged in by the respondent Butler were clearly conducted absent any preliminary indication of receptiveness on the part of those solicited. Her actions in waving down cars randomly on the street evidenced an arrogant disregard for the right of others to proceed along public thoroughfares unharassed.

The overtures of the respondent Uplinger, although somewhat less drastic, were arguably equally indiscriminate. According to the complainant Officer Nicosia, he was pursued by Uplinger when he attempted to leave the area where he and Uplinger had been talking. Only at that time did Uplinger make reference to the sexual act which was his purpose. The solicitation was thus thrust upon Nicosia at a time when he appeared to be uninterested in further discussion.

The potential for public disruption intrinsic to such solicitations constitutes a rational justification for the State's desire to regulate such acts as they occur in public. To suggest as did respondents below that there are individuals receptive to discreet solicitations in public places bears negligibly upon considerations relating to context. Assuredly, even discreet solicitations to receptive solicitees can be a source of bother or genuine disturbance to those involuntarily cast into the position of having to overhear them.

Compelling State Interest

Notwithstanding that the speech at issue, based upon its content and its context, is not protected by the First Amend-

ment or at best only minimally protected, it is submitted that the State does have a compelling interest in regulating the solicitation of deviate sexual acts. The First Amendment's guarantee of free trade in ideas protects more than a person's freedom to say or write or publish what he chooses. It also secures the liberty of each person to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free choice. *Ginsberg v. New York*, 390 U.S. 629, 649, 88 S. Ct. 1274, 1285, 20 L. Ed.2d 195, 209 (1968), (concurring opinion of Stewart, J.). By regulating public solicitation for deviate sexual activities, the State is acting upon its compelling interest in the protection of the right of an individual to choose not to hear on public streets solicitations of a lewd and intimate nature.³

It must be emphasized that the object of the statute under consideration is regulation of behavior occurring in a public place. However, because of the brief amount of time required to solicit another to perform a deviate sexual act, one who is solicited is of necessity a "captive audience" for the solicitor. In contrast to the situation presented in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed.2d 125

³Some nineteen states have laws similar to New York's which prohibit either loitering for solicitation or solicitation directly: Alabama: Crim. Code §13A-11-7(a)(3); Arizona: Crim. Code §13-2904; Arkansas: Ark. Stat. Ann. 41-2914; California: Pen. C.A. §647; Colorado: Col. Crim. Code §18-9-112; Delaware: Del. C. §11-1321; Georgia: O.C.G.A. §16-6-15; Kansas: K.S.A. 21-4108; Maryland: Ann. Code Art. 27 §15; Massachusetts: ALM GL c.272 §53; Michigan: MSA §28.570; Nevada: NRS §2)7.030; New Jersey: N.J.S.A. 2A:170-5; North Carolina: G.S. 14-204; Ohio: R.C. 2907.07; Oklahoma: 21 O.S. §1029; Oregon: O.R.S. 163-455; Rhode Island: G.L. 11-10-1; Wisconsin: WSA 947-02.

Five additional states have laws which prohibit sodomy or consensual sodomy and corresponding provisions which prohibit the solicitation to commit a crime: Montana: MCA 45-4-101, MCA 45-5-505; South Carolina: Code 16-1-40, Code 16-15-120; Tennessee: T.C.A. 39-1-401, T.C.A. 39-2-612; Utah: U.C.A. 76-2-202, U.C.A. 76-5-403; Virginia: Code of Va. 18.2-29, Code of Va. 18.2-361.

(1975), in which an individual could prevent any significant intrusion on his privacy by merely averting his eyes, the unreceptive individual who is indiscriminately solicited for a deviate sexual act, whether discreetly or not, suffers an unavoidable affront. His situation, as noted above, is similar to that of the unwilling listener in *Kovacs* who could not escape the opinions imposed upon him by others "by way of sound trucks with loud and raucous noises on city streets." Indeed, although the solicitee is on a public street, the degree of captivity which he experiences when confronted by one who wishes to solicit him is analogous to that of a bus passenger who is unavoidably subjected to advertisements in public buses. In *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S. Ct. 2714, 41 L. Ed.2d 770 (1974), this Court upheld the city's denial of display spaces on public buses to political candidates, reasoning that the degree of captivity of one who must of necessity travel by bus makes it impractical for an unwilling viewer or auditor to avoid exposure.

In both *Kovacs* and *Lehman*, the speech which the Court allowed to be restrained was protected inasmuch as its content was political. In contrast, the speech at issue herein, judged in terms of its content, is entitled to little or no First Amendment protection.

Under the circumstances as presented by the instant case, not only is the person being solicited denied his right to avoid hearing an indecent proposal if he so wishes, but the street encounter further infringes upon his right to privacy to the extent that it compels him to respond to such proposal, however minimally, in the presence of acquaintances and strangers alike. His right to avoid a public incident pertinent to intimate sexual matters has been abridged whether the solicitor behaves in a discreet or indiscreet manner.

In addition, due to the content of the communication, the hearer is highly likely to experience embarrassment, annoyance

or harassment. The unquestioned constitutional legitimacy of state harassment statutes indicates that the state has a legitimate interest in ensuring that individuals be protected from undue public annoyance or disturbance. The statute at issue does not contain a requirement of criminal scienter; however, it is submitted that, under present community standards, in which indiscriminate solicitation in public streets is an affront to the moral sensibilities of most members of the public, sufficient notice has been given to those who wish to randomly solicit so as to justify a strict liability standard. As noted in the dissenting opinion in the New York Court of Appeals decision under review:

"This statute embodies the Legislature's determination that public solicitation to engage in sexual conduct is necessarily offensive to others. While some may welcome such offers, there is nothing irrational in the Legislature's determination that the vast majority of people prefer to go about their everyday business without being stopped or solicited, especially when the solicitation involves offers to engage in the most intimate of activities.

Nor is it irrational for the Legislature to have decided that the presence of people soliciting in public to engage in sexual conduct is in and of itself annoying." (App. B, 5b)

While such solicitation certainly can be offensive to an unreceptive adult, its effect on minors is cause for even greater concern. The state's vital and compelling interest in safeguarding the welfare of minors has been upheld in several cases relevant to the issues at bar. In *Ginsberg v. New York*, *supra*, this Court permitted the states to prohibit the sale to minors of material defined to be obscene on the basis of its appeal to young people whether or not it would be obscene to adults. In *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed.2d 1073 (1978), the Court found constitutional a regulation permitting the Federal Communications

Commission to prohibit the broadcast of indecent language which was clearly not obscene, based in part upon a determination that children may have unsupervised access to radio receivers. Finally, in *New York v. Ferber*, ___ U.S. ___, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982), the Court upheld a New York statute which prohibited the knowing promotion of sexual performances by children, whether or not such performances were obscene.

Just as the use of minors in sexual performances creates a potential harm to those who are the object of the sexual exploitation, so too is there a similar potential for harm to youths whose sexuality becomes the subject of street discussion. Arguably, a solicitation to engage in deviate sexual behavior is potentially more damaging to an impressionable young person than either the hearing of an indecent radio broadcast or the viewing of materials harmful to minors but not necessarily obscene to adults. Young people who have forced upon them a direct and personal proposition of a lewd and intimate nature are exposed to an attack upon their individual sexual identity. Conceivably, the detrimental impact extends even to the young person who is not directly solicited but who is forced by his or her mere presence to be an observer to such solicitation.

An additional and equally compelling aspect of the State's interest in minors concerns the welfare of those young persons who, whether as a result of coercion or voluntary choice, are involved as solicitors of deviate sex for payment. Criminalization of the act of soliciting serves to limit the exploitative use of minors for deviate prostitution by discouraging the free flow of such commercial activity. Although concededly there are other laws permitting the prosecution of deviate prostitution, it is submitted that such laws do not easily succumb to enforcement due to the problem of proving payment absent solicitation of an undercover police officer. Under the reasoning of *Ferber*, the exploitation of

minors for deviate prostitution, an activity of unquestioned illegality, cannot be immunized by resort to the protection provided to speech by the First Amendment. *Ferber*, ____ U.S. ____, 102 S. Ct., at 3357, 73 L. Ed.2d, at 1125.

Finally, it is argued that the State has a compelling interest in regulating activities which constitute a public nuisance when such nuisance damages both the character of a residential neighborhood and the viability of local commercial interests. Again it is noted that the activity which the State here attempts to prohibit is public and not private. The court below in its majority memorandum determined that the State had no basis upon which to punish loitering for conduct anticipatory to the act of consensual sodomy, a legal act. Not only does this position ignore the fact, as noted above, that the term "deviate sexual acts" includes acts whose illegality is unchallenged, but it provides no reasoning to support a conclusion that public solicitation for any deviate sexual act, legal or illegal, must be tolerated.

Despite the fact that sodomy conducted in private between consenting adults has been deemed legal, the State unquestionably has the power to prohibit acts of consensual sodomy in public places. (See New York Penal Law §245.00 dealing with Public Lewdness). Similarly, while a private overture to a receptive adult may be an activity protected by the First Amendment, such protection does not automatically extend to public solicitation.

That the solicitations at issue did in fact cause harm both to residents, even if unsolicited themselves, as well as to area businesses was shown by the testimony of persons living and working in the immediate area of the solicitations. Residents who were forced to view solicitations were concerned for the welfare of their children; business proprietors expressed concern about the stag lines of male prostitutes or solicitors whose presence served to intimidate customers. There were

complaints about the changing character of the neighborhood epitomized by the testimony of the district councilman who was himself solicited as he sat in his car waiting for his son to complete a tutoring session.

While often unprovable at this stage of activity, the solicitation is commonly part of a proposal for prostitution, a commercial activity presently prohibited by the State. As such, the speech falls clearly within the ambit of valid governmental regulation pertinent to the prevention of offenses deemed criminal. In the case of respondent Butler, the solicitation was followed by an act of sodomy performed in a car parked on the street. Prior to this act, the respondent was observed waving to cars and calling out to motorists. Where such activity is tolerated under the rubric of an individual's right to perform acts of consensual sodomy, prostitution activities will flourish unchecked. The State's interest in preventing the deterioration of a residential neighborhood, the concomitant decline of commercial and residential property values, and the increase in criminal activity, especially prostitution, is sufficiently compelling to justify some regulation of speech. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed.2d 310 (1976).

The regulation at issue can be compared to the regulation permitted by this Court in *Pacifica* in which the Court agreed with the petitioner that an offensive public broadcast "should be regulated by principles analogous to those found in the law of nuisance where the 'law generally speaks to channeling behavior more than actually prohibiting it.'" 438 U.S., at 731, 98 S. Ct., at 3031, 57 L. Ed.2d, at 1082. The law in the instant case similarly is directed toward removing solicitation from the public streets while not preventing its occurrence in non-public places such as private clubs catering to a clientele tolerant of alternative sexual behavior wherein one's presence may be considered an indication that such solicitation would not be offensive.

In sum, neither the content nor context of the speech here inhibited overcomes the State's obvious interest in providing for order in the community.

Association

It was argued by the respondent Uplinger in the Court of Appeals that the statute at issue was violative not only of free speech but also of his First Amendment right to freedom of association. Uplinger, an admitted homosexual, contended that, "[i]mplicit in the prohibition of Penal Law §240.35-3 is the effort to discourage [him] from meeting new people and, in the process, where he thinks it appropriate, to fully exercise his right of association by discreetly discussing with them in a public place, but in a private manner, the possibility of engaging in deviate sexual activities." (Appellant Uplinger's Brief to Court of Appeals, p. 60).

To the contrary, a ban on the solicitation of deviate sexual activities does not prevent persons who wish to pursue a homosexual lifestyle from meeting or associating publicly with others of like interests. Further, it does not prevent them from instituting conversations with strangers which permissibly could include a polite inquiry as to whether or not the stranger was himself a homosexual. Nor does the statute in any way prohibit public discussion among persons of any sexual orientation regarding matters which are of general concern, except only to prohibit a direct solicitation of another to engage in a deviate sexual act.

A public assemblage of any number of persons for the purpose of supporting or advocating the rights of homosexuals is clearly a protected activity which is not outlawed by the statute at issue. In addition, the statute imposes no restraint upon political statements in support of homosexuality or other sexual proclivities.

Insofar as the conduct not proscribed by the statute allows a person to identify others who would be receptive to a

solicitation, one can with relative ease establish a basis for a permissible private solicitation which does not harm members of the public who wish neither to be solicited nor to hear the solicitation of others. The right to assemble and associate freely with others is protected; it is only the specific act of solicitation as it occurs in public which is prohibited.

As was observed by the Court in *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S. Ct. 1686, 1688, 29 L.Ed.2d 214, 217 (1971), the government, by enacting and enforcing ordinances directed with reasonable specificity toward conduct to be prohibited, may prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. The statute herein, directed only toward prohibition of the public nuisance created by a lewd public solicitation, represents a rational attempt by the State to regulate annoying conduct on a public street.

Overbreadth

The scope of the First Amendment overbreadth doctrine is generally recognized as an exception to the rule against Constitutional challenges to a statute not based upon situations before the Court. However, a statute which reflects a close nexus between the means chosen by the Legislature and the permissible ends of government will not be struck down simply because occasional applications that go beyond constitutional bounds can be imagined. *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). As made explicit by this Court in *Broadrick*, the overbreadth rule will not be invoked in the absence of a *substantial* infringement upon protected activity:

"... particularly where conduct and not merely speech is involved; we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U.S., at 615, 93 S.Ct., at 2918, 37 L.Ed.2d, at 842.

Because the statute at issue is an attempt to regulate the behavior of those who would publicly loiter in order to solicit or to engage in deviate sexual acts, it clearly encompasses conduct as well as speech.

Respondents argued below that the statute, by design and in application, was overbroad inasmuch as it could apply equally to solicitations made in a deserted park or on a busy street; to solicitations made to strangers as well as to those known to the solicitor; and finally to solicitations made abruptly as well as to those following extended conversation. Petitioner contends that all such behavior, as long as it occurs in public, is a legitimate target of the statute.

It was the intent of the Legislature to protect persons in public areas from being subjected, either as solicitees or as involuntary witnesses, to lewd suggestions for sexual activity. A person solicited in a deserted park can as readily experience embarrassment or offense as one solicited on a busy street. A public solicitation by one known to the solicitee can be as unwelcome, or potentially more unwelcome, than one made by a stranger.

The only imaginable situation falling outside the intent of the statute would involve a discreet and inoffensive solicitation at a deserted public location between participants who are receptive to the suggested sexual activity. The number of instances in which the statute would be applied to such a situation is undeniably small in comparison to the number of instances of unprotected behavior which are the law's legitimate objects.

As concerns the legislative purpose, it is significant that the activity here attempted to be regulated is generally interspersed with, and a part of, both male and female prostitution activities. The respondent Butler, a prostitute, was seen waving down passing cars on a public thoroughfare. She was subsequently arrested while committing an act of fellatio upon a male on a public street. While no proof was presented with respect to payment, logic compels the inference that an ex-

change of money was part of the transaction. The record of the hearing held upon the charge against respondent Uplinger did not provide evidence of monetary payment; however, that same record did demonstrate a substantial incidence of male prostitution activities in the very area where Uplinger was arrested.

The conclusion to be drawn from the factual circumstances of these cases is that a significant amount of the speech sought to be prohibited relates to illegal activity. As such, this speech is subject to no constitutional protection. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949). Beyond the fact that the speech pertains to matters wholly illegal, its commercial character renders it immune to challenge on the basis of overbreadth. *Bates v. State Bar of Arizona*, 433 U.S. 350, 380-381, 97 S.Ct. 2691, 2707-2708, 53 L.Ed.2d 810, 834 (1977).

Facial invalidation of a statute based upon an overbreadth analysis must be carefully tied to the circumstances in which it is truly warranted, must be employed with hesitation and only as a last resort, and must involve a substantial overbreadth. *Broadrick v. Oklahoma*, *supra*. It is submitted upon these criteria, that the New York statute at issue is not even remotely subject to such constitutional invalidation.

Underinclusiveness

In the courts below, respondents sought to invoke a declaration of unconstitutionality based upon the underinclusiveness of the statute, claiming that the Legislature's failure to regulate solicitations for normal sexual intercourse in the same manner as solicitations for deviate sexual intercourse rendered the statute fatally underinclusive. Because of the unprotected or minimally protected nature of the solicitations themselves, and the rational state purpose in differentiating between normal and abnormal sexual acts, the statute may not be deemed unconstitutionally underinclusive.

It is argued that in view of this Court's recent decision in *New York v. Ferber*, ____ U.S. ____, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), the concept of underinclusiveness is inapplicable to the statute in question. At issue in *Ferber* was a criminal statute, New York Penal Law §263.15, which prohibited the promotion of performances involving sexual conduct of a child. Finding that the New York Legislature had failed to similarly proscribe the promotion of performances including other conduct dangerous to the health or well-being of a child, the New York Court of Appeals found the statute "strikingly underinclusive" in light of *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). The holding in *Erznoznik*, involving a Jacksonville city ordinance, was distinguished:

"18. *Erznoznik* * * * struck down a law against drive-in theaters showing nude scenes if movies could be seen from a public place. Since nudity, without more is protected expression, *id.*, at 213, we proceeded to consider the underinclusiveness of the ordinance. The Jacksonville ordinance impermissibly singled out movies with nudity for special treatment while failing to regulate other protected speech which created the same alleged risk to traffic. Today, we hold that child pornography as defined in §263.15 is unprotected speech subject to content-based regulation. Hence, it cannot be underinclusive or unconstitutional for a State to do precisely that." ____ U.S. ____, 102 S.Ct. at 3359, 73 L.Ed.2d at 1128, n. 18.

Since the conduct sought to be regulated by New York's loitering statute, like child pornography, is not entitled to protection and is subject to regulation, particularly in view of the compelling state interest, the statute cannot be deemed fatally underinclusive.

The decision of the New York State Legislature to make the loitering provision applicable only to acts or solicitations involving "deviate sexual intercourse or other sexual behavior of

a deviate nature" represented a conscious legislative determination. As originally proposed, the statute would have prohibited solicitations to engage in both deviate and normal sexual acts.⁴ It was considered that such solicitations were unsalutary or unwholesome from a social viewpoint.⁵ In amending the language of the provision so as to only proscribe solicitations to engage in deviate sexual acts, the Legislature consciously stated its conclusion that such solicitations were palpably more obtrusive.

Although the New York Court of Appeals here conceded that the Legislature could enact a statute prohibiting one from accosting in an offensive manner or in an inappropriate place, or from soliciting another to perform the act in a public place, it held that the absence of a requirement that the conduct be offensive or annoying to others rendered the loitering statute deficient. Statutes governing conduct which offends or annoys already exist in New York and punish at the same level of offense as the loitering provision. New York Penal Law §240.20, Disorderly Conduct,⁶ applicable to conditions of-

⁴Study Bill, Senate Int. 3918, Assembly Int. 5376, 1964 Legislative Session, Section 250.15-3: "A person is guilty of loitering when he: . . .3. Loiters or remains in a public place for the purpose of committing, attempting to commit, or soliciting another person to commit a lewd or sexual act . . ."

⁵See Commission Staff Notes, Article 250, pages 387-388, appended to Study Bill, *supra*.

⁶§240.20 Disorderly conduct.

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:
• • •

3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or • • •

5. He obstructs vehicular or pedestrian traffic; or • • •

7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.

Disorderly conduct is a violation.

fensive to the public, and Penal Law §240.25, Harassment,⁷ applicable to conditions offensive to an individual, already regulate the type of conduct which respondents here allege is uncontrolled.

What New York has established is not a statutory framework which fails to punish solicitations for normal sexual activity, but one in which such punishment is premised upon proof of an additional element of inconvenience, annoyance or alarm. That the loitering statute is framed in terms of strict liability merely reflects the valid legislative judgment that "deviate sexual intercourse or other sexual behavior of a deviate nature" is presumptively more offensive to the greater portion of the public. Such is a rational legislative determination and does not give rise to a sustainable claim that the loitering statute on its face is underinclusive.

The argument presented by respondent Uplinger to the effect that the statute under consideration may be underinclusive because it fails to subject married persons to the prohibition against public solicitation, reflects an improper assessment of the Legislature's objective in promulgating this statute. The Equal Protection Clause of the Fourteenth Amendment denied to the States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. *Eisenstadt v. Baird*, 405 U.S. 438, 448, 92 S.Ct. 1029, 1035, 31 L.Ed.2d 349, 359 (1972). However, classifications are

⁷§240.25 Harassment.

A person is guilty of harassment when, with intent to harass, annoy or alarm another person: * * *

2. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or * * *

5. He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

Harassment is a violation.

permitted where they are reasonable, not arbitrary, and where they rest upon some ground or difference having a fair and substantial relation to the object of the legislation.

A primary objective of the State in prohibiting loitering for the purpose of soliciting deviate sexual acts is to protect members of the public from being harassed by indiscriminate solicitations of a lewd and intimate kind made by persons whom the solicitee neither knows nor seeks to know. It thus reflects a concern for an individual's right to a modicum of privacy, even in a public place, especially as it relates to intimate sexual matters.

Because of the intimate relationship that exists between persons who are married, the danger of an indiscriminate intrusion upon spousal privacy is not a harm which this statute need address. It should be recognized, however, that the statute does not allow *carte blanche* solicitations between married individuals on a public street. Their solicitation of each other for deviate acts other than sodomy is clearly proscribed. Given the degree to which the marital relationship with its concomitant right to privacy is protected by our society, (*Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)), a classification which exempts married persons from prosecution for solicitation of one another for legal but not criminal sexual acts is not unreasonable.

Vagueness

Only last term, this Court in *Kolender v. Lawson*, ___ U.S. ___, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), reaffirmed the basic constitutional principle that "[o]ur Constitution is designed to maximize individual freedoms within a framework of ordered liberty." ___ U.S. ___, 103 S.Ct., at 1858, 75 L.Ed.2d, at 909. Implicit within that framework is the concept that a criminal offense be defined "with sufficient definiteness that ordinary people can un-

derstand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* In *Colten v. Commonwealth of Kentucky*, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed. 2d 584 (1972), this Court further characterized the vagueness doctrine:

"The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. We agree with the Kentucky court when it said: 'We believe that citizens who desire to obey the statute will have no difficulty in understanding it . . . ' " 407 U.S., at 110, 92 S.Ct., at 1957, 32 L.Ed.2d, at 590.

Measured against these collective standards, New York Penal Law §240.35 subd. 3 satisfies all constitutional criteria.

Both respondents contended in the courts below that the statute proscribing loitering was unconstitutional due to the inherent vagueness of the phrase "deviate sexual intercourse or other sexual behavior of a deviate nature." Although conceding that "deviate sexual intercourse" is appropriately defined in Penal Law §130.00 subd. 2, they nonetheless claimed that the remainder of the phrase, "other sexual behavior of a deviate nature" is not susceptible to adequate definition.

All that is constitutionally required is that the statute "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222, 227 (1972). Since, as noted earlier, the words "other sexual behavior of a deviate nature" are keyed to a concept which has a clear, common understanding, i.e. sexual abnormality, the statute is not plagued by any uncertainty which would place an unwarranted amount of

discretion in the hands of the police, judges or juries. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

Given the limitations of language in general, and the inability to prospectively catalogue every activity which a solicitor might seek to foist upon the public, the statute satisfies constitutional standards. In *United States v. Petrillo*, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947), involving the construction of a statute utilizing the phrase "number of employees needed," this Court noted as follows:

"The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more." 332 U.S., at 7-8, 67 S.Ct., at 1542, 91 L.Ed., at 1883.

The precision of the New York legislative enactment under consideration is abundantly demonstrated, particularly with respect to the acts involved here. In the present case, both respondents had either engaged, or offered to engage, in conduct which involved contact between mouth and penis, conduct clearly embraced by the terms of the statute. Neither respondent claimed below that they had no way of knowing that their conduct was proscribed by the statute or that they were uncertain as to its limits.

More importantly, however, since the conduct committed by each clearly fell within the terms of the statute, neither has standing to assert a claim that the statute is void for vagueness. In *United States v. Wurzbach*, 280 U.S. 396, 50 S.Ct. 167, 74 L.Ed. 508 (1930), a representative to Congress challenged the validity of a statute which prohibited a Senator or Represen-

tative, among others, from soliciting or receiving political contributions from Federal officers or employees. This Court stated as follows:

"It is argued at some length that the statute, if extended beyond the political purposes under the control of Congress, is too vague to be valid. The objection to uncertainty concerning the persons embraced need not trouble us now. There is no doubt that the words include representatives, and if there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by some one whom it concerns." 280 U.S., at 399, 50 S.Ct., at 169, 74 L.Ed., at 510.

More recently, this Court had the opportunity to review a due process claim in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed. 2d 310 (1976), where the vagueness of a municipal Anti-Skid Row Ordinance was called into question. The ordinance provided, in part, that an adult theater, distinguished by an emphasis on specified sexual activities or specified anatomical areas, could not be located within 1000 feet of any two other regulated uses. The owners contended that the statute was impermissibly vague in that 1) they could not determine how much of the described activity was permissible before the exhibition was "characterized by an emphasis" on such matter, and 2) the ordinance did not specify procedures or standards for obtaining a waiver of the 1000 foot restriction. In finding that "[t]he application of the ordinances to respondents is plain," 427 U.S., at 61, 96 S.Ct., at 2448, 49 L.Ed.2d, at 321, this Court noted:

"We find it unnecessary to consider the validity of either of these arguments in the abstract. For even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents. The record indicates that both theaters propose to offer adult fare on a regular basis. Neither respondent has alleged any basis for claiming or anticipating any waiver of the restriction as applied to its theater. It is clear, therefore, that any element of vagueness in these ordinances has not affected these

respondents. To the extent that their challenge is predicated on inadequate notice resulting in a denial of procedural due process under the Fourteenth Amendment, it must be rejected." 427 U.S., at 58-59, 96 S.Ct., at 2446-2447, 49 L.Ed.2d, at 319.

Since the conduct attributable to both Butler and Uplinger is clearly embraced within the statute, neither is what might be called an "entrapped innocent." (See L. H. Tribe, *American Constitutional Law*, 718-719 (1978)). Neither, therefore, has standing to raise the issue of vagueness.

Both facially and as applied to the respondents at bar, New York's loitering statute represents a clear and concise attempt to regulate offensive conduct in public and should not be deemed unconstitutional as an impermissibly vague enactment.

CONCLUSION

THE JUDGMENT OF THE NEW YORK STATE COURT OF APPEALS SHOULD BE REVERSED.

Respectfully submitted,

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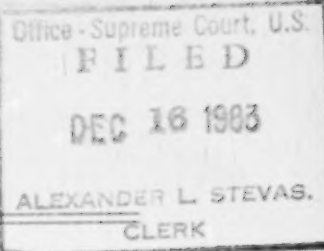
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No. 82-1724



IN THE
Supreme Court of the United States

October Term, 1983

STATE OF NEW YORK, *Petitioner,*
vs.

ROBERT UPLINGER and SUSAN BUTLER, *Respondents.*

ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS.

BRIEF OF RESPONDENT ROBERT UPLINGER

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Questions Presented

1. As applied to loitering for the purpose of engaging in [a] a discreet, private conversation [b] with one other adult in a public place, [c] where there is no one present who can overhear the conversation and [d] where the speaker does not know, and has not acted recklessly in failing to determine, that the other person would be offended by an invitation to go to a private residence and engage in a legal act of sex, does New York Penal Law §240.35-3 (the "Statute") unconstitutionally infringe on First and Fourteenth Amendment rights to freedom of speech and association as to respondent Uplinger and others in similar circumstances?

2. Is the Statute unconstitutionally vague insofar as it is applied to such a loitering situation?

3. Does the Statute violate due process rights?

4. Does the State have a compelling interest which would require that the Statute be upheld?

5. Does the Statute violate rights to the equal protection of the laws of homosexuals insofar as it singles out "deviate" sex acts from other types of sex acts as proscribed objectives of such loitering, thereby discriminating against those (particularly homosexuals) who engage in such variant sex practices?

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GLOSSARY.

The following terms of art and abbreviations are used in this Brief.

Cert. App. = Petition for Certiorari herein, citing the designated Appendix thereto, with the page indicated.

California Commission = Commission on Personal Privacy, State California, appointed by Hon. Jerry Brown, Governor, and which rendered its Report in December 1982.

Commission = New York State Temporary Commission on the Revision of the Penal Law and Criminal Code [footnotes 20, 22 and 23 and accompanying text].

P.L. = New York Penal Law.

Statute = New York Penal Law, Section 240.35-3, Loitering for deviate-sex purposes.

IN THE
Supreme Court of the United States

October Term, 1983

No. 82-1724

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER and SUSAN BUTLER,

Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK
STATE COURT OF APPEALS.

BRIEF FOR RESPONDENT ROBERT UPLINGER

Respondent Robert Uplinger respectfully presents his Brief in opposition to the request of the State of New York that the judgment below be reversed.

Statement of the Case

Facts of the incident

The arrest resulted from Officer Nicosia's successful undercover efforts at 2:50 A.M. on North Street in

Buffalo (J.A. 104-105).¹ His assignment was "to talk to suspected homosexuals and arrest them if he was propositioned" (Cert. App. D, 4d). Uplinger said, "hello", "how are you?" to the officer and general conversation ensued, with the officer joining in. Uplinger asked if the officer wanted to "get high" and received a negative answer. At some point, Uplinger asked, "Well, what do you like to do?", and received an answer, "I don't know, what do you like to do?" The conversation went back and forth for a while (J.A. 104).

Acquaintances of Uplinger walked up; he introduced them to Nicosia. Other police officers appeared and ordered everyone to move along; they all complied. Uplinger followed (not "pursued") Nicosia as they moved away (J.A. 104).² He invited Nicosia to his apartment. The officer asked what Uplinger wanted to do; he gave a non-committal response. Officer Nicosia feigned his intent to leave for fear of the police. At that, Uplinger again invited the officer to his apartment, this time explaining the type of sex act Uplinger had in mind.³ He was then arrested (J.A. 104-105).

¹ North Street is not just a "quite residential neighborhood" street (State's Brief, 4). It has a hotel, with a Howard Johnson's at the corner of North and Delaware, and with a "lot of people in this area" (Officer Burgstahler, J.A. 62). Across from the hotel at 140 North where Nicosia was standing (J.A. 104) was a stone wall and a large vacant lot (J.A. 64). The area had become a meeting place for homosexuals at late night and early morning hours. Only two people were together at a time when sexual solicitation could be established (J.A. 61, 74), but congregations of young men were frequently observed, 15 in a two-block area at the most (J.A. 77-78), generally no more than 4 or 5 together at one time (*id.*), but, according to one resident, never more than 3 to 4 at one time (J.A. 43) and, frequently, solitary persons (J.A. 40). While some male prostitution activity has occurred in recent years, the long-established pattern of non-prostitute homosexuals meeting each other continues.

² Uplinger did not "pursue" Officer Nicosia in any persistent or predatory manner, as suggested by the State; he merely "followed" the officer (J.A. 104; contrast State's Brief, 4, 15).

³ The proposal contemplated oral sodomy (J.A. 105).

It took 10 or 15 minutes (J.A. 127). No monetary consideration was involved (J.A. 76).⁴ While the undercover officer initially refused to go to Uplinger's apartment, that refusal was explained in terms of being afraid of the police, not in terms of being offended at what might occur there (J.A. 104). Throughout the suggestive conversation, Nicosia did not indicate in any way that he might be offended at any suggestion of "deviate" sex.⁵

The trial motion and hearing procedure

Uplinger moved to dismiss the information on the ground of the loitering statute's unconstitutionality (J.A. 12-16).⁶ City Court held a hearing on the motion, taking testimony from City personnel and private citizens on their perception of the problems posed by homosexuals in public places. With one exception, the testimony did not relate to the actual incident.⁷ There was no suggestion that any offensive conduct mentioned in the

⁴ The State now equivocates (State's Brief, 21, 25), but the record is clear. "The People concede that the sexual contact offered here was not related to prostitution and was intended to be performed in private." Affirmation, Assistant District Attorney Lokken to the trial court, 9/23/81, at Record 52.

⁵ To the contrary, the location of the street as one where homosexuals frequently meet, the hour of the night, the fact that Officer Nicosia was loitering on the street, in keeping with his assignment, and the officer's willingness to engage in small talk with suggestive overtones ["Do you want to get high?", "What do you like to do?"] for a 10 to 15 minute period, all without objection or departure from the conversation, would have tended to assure Uplinger that the officer would not be offended at the suggestion of sex. Nicosia's feigned fear of the police was not inconsistent with this view.

⁶ The one non-constitutional argument (J.A. 13, para. 2) was later abandoned. The grounds for the motion in the motion papers were somewhat expanded on oral argument (J.A. 82-98), and Uplinger's present arguments were presented to the New York Court of Appeals.

⁷ Officer Burgstahler, a witness in the pre-trial hearing, assisted in Uplinger's arrest and testified briefly on that subject (J.A. 76-77).

testimony⁸ was engaged in by Uplinger. Witness Marcy was concerned about prostitutes, not lonely homosexual men seeking companionship (J.A. 59); much of the testimony was to the effect that homosexuals should go to gay bars and stay off the streets (J.A. 39, 58, 78, 121, Cert. App. D, 9d), although violations of the Statute could as easily occur there as on the street. The police consider the Statute as enforceable in one public place as another, including in gay bars (J.A. 121). The trial court acknowledged that the non-prostitute homosexual presented little public problem, but it assumed that male prostitutes would follow such persons to the same area, and that, purportedly, provided the trial court's justification for preserving the Statute (Cert. App. D, 6d-7d). Police and other testimony made it clear that the triggering "offensiveness" of the situations complained of was the presence of these men on the streets, whether or not for the purpose of soliciting sex.⁹

The appeals

Uplinger's appeal to the New York Court of Appeals was not limited to the issues of due process and freedoms of speech and association (State's Brief, 6).¹⁰

⁸ For example, offensive solicitation by male prostitutes (J.A. 73); homosexuals "saturating the area, committing other disorderly acts, urinating on . . . grass and so on and so forth" (J.A. 125).

⁹ Note references to "suspected homosexuals" (J.A. 18, 108, 124) "hanging around" (J.A. 62, cf. 118-119). The trial court noted this general perceived offensiveness: "The main reason [why the community and the police object to this kind of loitering] is that the occasional soliciting of a teenager or others by homosexuals and the appearance of homosexuals outside homes reinforces the age-old fear that people have of homosexuals and renews the offense they take at their activities" (Cert. App. D, 8d, emphasis added).

¹⁰ However, Uplinger did not argue below that denial of equal protection resulted from the exemption of husbands and wives. (See State's Brief, 28-29). The trial judge ruled on that issue *sua sponte*, as a counterpoint to his earlier decision in *Butler* (See Cert. App. D, 1d-3d; cf. App. E).

Uplinger argued, in addition:

1. Penal Law §240.35-3 was, in effect, a mere loitering-vagrancy Statute, with no requirement for overt conduct or for a legitimately proscribed loitering objective (e.g. criminal acts, presence on prohibited premises). The Statute was unconstitutionally vague under *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).¹¹

2. The Statute was underinclusive, violating the right to equal protection of the laws.¹²

3. The absolute prohibition against solicitation in a public place unconstitutionally burdened Uplinger's constitutional right of privacy in connection with his ability to engage in consensual, "deviate" sexual intercourse in private.¹³

¹¹ See Uplinger Brief, Court of Appeals, 7/19/82 ("Brief Below"), 21-41. Regarding preservation of the issue for appeal, see Brief Below at 2-3.

¹² *Id.*, 63-66.

¹³ See *amicus curiae* briefs below of Lambda Legal Defense & Education Fund, 8/12/82 (at 10-24) and Center for Constitutional Rights, 7/29/82 (at 24-34). The right of privacy here involved had been previously determined in *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936 (1980), *cert. den.* 451 U.S. 987 (1981).

Summary of Respondent's Argument

Point I. Petitioner originally asked that the holding of the New York Court of Appeals in *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936 (1980), *cert. den.* 451 U.S. 987 (1981), be reviewed as part of this appeal, but has now abandoned that request. The constitutional right of privacy declared by *Onofre* was not directly presented to the courts below for reconsideration in this case. It probably should not be considered by this Court under a proper application of the "not pressed or passed on below" rule. If, on the record now before the Court, the Court wishes to review that issue, further briefing should be required from the State, with an opportunity to respond accorded to Uplinger.

Point II. The Court of Appeals first construed the loitering law narrowly to apply to loitering for the purpose of engaging in the former crime of consensual sodomy (N.Y. Penal Law §130.38), declared unconstitutional by *People v. Onofre, supra*. It then found the Statute, as so construed, unconstitutional. The State incorrectly asks this Court to ignore the construction of the Statute by the State's Court of Appeals. As a result of the narrowing construction of the Statute, the scope of the provision is coextensive with its actual application to Uplinger, and the court below did not err in striking the Statute down in its entirety.

Point III. The loitering statute, as construed and applied, violates the First Amendment free speech rights of Uplinger and of others affected by the provision. Uplinger was arrested as a direct result of his speech. The exceptions to free speech rights do not apply here. The speech was not obscene or lewd. The Statute cannot be justified as being directed against incitements to crime. No justification for the Statute can be based on a motive to protect minors. The "fighting words" exception to free speech does not apply. This Court

should not expand that exception to reach mere "offensive" speech; if it did so, however, any such expanded exception could not apply to Uplinger's conduct here, anyway. There was no intent to offend and the police officer was not, in fact, offended. The Statute is too broadly written and encroaches on First Amendment rights. A narrowly drawn statute could provide time, place and/or manner regulation. Models of such statutes exist in California, Massachusetts and Ohio.

Point IV. The loitering statute is an infringement on First Amendment rights of freedom of association, due to its indirect tendency to chill exercise of those rights and due to its direct effort to limit association of like-minded people in public and, further, its effort to prevent citizens from inviting others to their personal residences for any lawful purpose.

Point V. There is no compelling state purpose for the Statute. Accordingly, there is no basis to permit the Statute to stand in the face of the First Amendment rights involved.

Point VI. The Statute is discriminatory and underinclusive in violation of Uplinger's right to the equal protection of the laws. There is no basis to sustain the Statute's validity when similar protection is withheld from women subjected to "normal" sexual solicitation. The statutory scheme perpetuates a cultural but constitutionally improper assumption of a male-dominated society with women being sexually submissive objects of male sexual aggressiveness. Other men directing their sexual solicitations toward women are not punished, thereby discriminating against homosexuals.

Point VII. The Statute is unconstitutionally vague and violates due process under principles of *Papachristou v. City of Jacksonville*, *supra*. Moreover, failure to couple

the "loitering" aspect of the Statute with a legitimately proscribable objective (illegal act, limited-access premises, etc.) renders the Statute invalid as being beyond any legitimate state purpose and, further, enhances the vagueness quality of the legislation. Because First Amendment rights are involved, Uplinger is entitled to argue the rights of others: those gay people who are in public and subject to the Statute because of their "purpose", but who have not yet overtly acted thereon.

Point VIII. If the Court reviews the question whether there is a constitutional right of privacy for the performance of sex between two adults, acting consensually, without financial consideration and in a private home, the Court should uphold such a right of privacy. The decision of the Court of Appeals in *People v. Onofre, supra*, is correct. The subject right of privacy is supported by prior decisions of this Court in related situations. Whatever the limits of such right, it at least encompasses voluntary, non-commercial, sex acts in a private residence involving only two adults. It is not necessary to extend this privacy right beyond the front door of the residence. Uplinger's position with respect to his arrest and conviction herein is fully supported by his rights of free speech, association and due process, independent of the right of privacy which would apply to the ultimate act.

POINT I

If the Court considers the right-of-privacy question relating to private, adult and consensual sex, further briefing should be required.

In *People v. Onofre*, *supra*, the New York Court of Appeals struck down a criminal prohibition of consensual sodomy, in part, because the federal Constitution's right of privacy extended to non-commercial, adult, consensual sex in a private residence. *Id.*, 51 N.Y.2d at 485, 415 N.E.2d at 938-939. In *Uplinger*, that Court held that the State could not prohibit a discreet invitation for sex, when the sex itself could not be prohibited. "This statute [New York Penal Law §240.35-3], therefore, suffers the same deficiencies as did the consensual sodomy statute." Cert., App. B, 2b.

The State now abandons its request for review of the *Onofre* holding (State's Brief, 2). However, because this Court may review "plain error" without request [Rule 34.1(a)] and because the privacy issue may be necessarily implicated by the decision below, it is addressed herein to a limited extent.

However, in *Illinois v. Gates*, _____ U.S. _____ (1983), 76 L.Ed.2d 527, decided after submission of the *Uplinger* certiorari papers, this Court held that the "not pressed or passed on below" rule should be applied where the State failed "to raise a defense to a federal right or remedy asserted below." *Id.*, 76 L.Ed.2d at 537.

In this case, *Uplinger* urged the unconstitutionality of the loitering law because *Onofre* had, in effect, legalized private consensual sodomy, the object of his invitation to Officer Nicosia. *Onofre*'s correctness was assumed below by both *Uplinger* and the State. New York did not request reconsideration of *Onofre* in the *Uplinger* proceedings. Accordingly, the question whether *Onofre* was correctly decided by the 1980 Court of Appeals was not directly presented for review by the same Court in 1983.

There are differences between *Uplinger* and *Gates*, however. The deferred question in *Gates* (whether a good-faith exception should be grafted onto the exclusionary rule remedy) was readily severable from the underlying constitutional right (whether the police acted properly under the Fourth Amendment). In *Uplinger*, however, the underlying question of the individual's constitutional right of privacy was implicitly before the Court for further consideration, at least to determine whether the right should be extended beyond the *act* of sex to the *invitation* for sex.

The first *Gates* policy reason for refraining from reviewing the issue is also present in *Uplinger*—absence of full record development. *Id.*, 76 L.Ed.2d at 537.¹⁴ The second policy consideration, deference to initial state-court review, is less forcefully present, since the *Onofre* holding is recent and the likelihood of modification by the state court negligible.¹⁵ Giving the state court the chance “to rest its decision on an adequate and independent state ground” (*id.*) is also diminished in importance, because the Court of Appeals specifically refused to take that route in the 1980 *Onofre* holding itself.¹⁶

If *Gates* considerations prevail, this Court will not rule on the *Onofre* right of privacy issue. If, however, that

¹⁴ In *Onofre*, a lengthy hearing was held in City Court as to two of the defendants, with testimony being taken and certain text materials introduced in evidence. For an example of a civil case with full record development on the issue, see *Baker v. Wade*, 553 F. Supp. 1121 (DC Tex. 1982) [appeal pending].

¹⁵ After *Onofre*, Judge Gabrielli, who wrote the dissent, retired. He was replaced by Judge Simon, who had joined in the unanimous opinion of the intermediate appellate court which had also struck down the sodomy law. *People v. Onofre*, 72 A.D.2d 268, 424 N.Y.S.2d 566 (4th Dep't 1980).

¹⁶ The Court declined to rule under the New York Constitution, even though request for that relief was specifically renewed by motion for reconsideration. *People v. Onofre*, 52 N.Y.2d 1072 (1981).

issue is necessarily implicated by the *Uplinger* decision below, leading to review of the question herein, the Court should require further briefing by the State, with an opportunity for response by Uplinger. The subject is within the class of "difficult issues of great public importance" (*id.*, 76 L.Ed.2d at 539), meriting full adversarial consideration.

POINT II

This Court is bound by the narrow construction of the loitering statute adopted by the court below.

The Court of Appeals first narrowed the loitering provision by statutory construction and then determined that, as construed, it was unconstitutional. This Court is bound by the state-court construction of the Statute in reviewing the correctness of that court's declaration of its unconstitutionality. *Kolender v. Lawson*, _____ U.S. _____ (1983), 75 L.Ed.2d 903, 908 fn. 4, and text; *Orr v. Allen*, 248 U.S. 35, 36 (1918).

Analysis of the text of the Court of Appeals decision demonstrates the accuracy of respondent's premise.

A. "The statute challenged on these appeals (Penal Law, §240.35, subd 3) . . . MUST BE VIEWED AS A COMPANION STATUTE TO THE CONSENSUAL SODOMY STATUTE (Penal Law, §130.38) which criminalized acts of deviate sexual intercourse between consenting adults." *People v. Uplinger*, Cert. App. B, 2b. (Emphasis added).

The impact of that determination by the Court of Appeals is well-established. "When the Supreme Court of the State has held that two or more statutes must be taken together, we accept that conclusion as if written into the statutes themselves." *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 480 (1932).

B. "We held in *People v. Onofre* (51 NY2d 476) that the State may not constitutionally prohibit SEXUAL BEHAVIOR CONDUCTED IN PRIVATE BETWEEN CONSENTING ADULTS. Inasmuch as THE CONDUCT ULTIMATELY CONTEMPLATED BY THE LOITERING STATUTE may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose. . . . [I]T IS APPARENT FROM THE WORDING OF THIS STATUTE that it was AIMED AT PROSCRIBING OVERTURES, NOT NECESSARILY BOTHERSOME TO THE RECIPIENT, LEADING TO WHAT WAS, AT THE TIME THE LAW WAS ENACTED, AN ILLEGAL ACT." *People v. Uplinger*, Cert. App. B, 2b-3b. (Emphasis added).

In other words, the loitering law, P.L. §240.35-3, was intended as an aid in the enforcement of the consensual sodomy statute, P.L. §130.38. As explained below, the consensual sodomy law was intended to reach private, "deviate"-sex activity, not necessarily related to public sexual offensiveness. This *public* loitering, for this *private* purpose, was the one public sexual offense not already covered by the New York statutory scheme governing sexual behavior.¹⁷

C. "Because the statute itself is devoid of a requirement that the conduct proscribed be in any way offensive or annoying to others, THE CHALLENGED STATUTE CANNOT BE CATEGORIZED AS A HARASSMENT STATUTE. *Id.* at 2b. (Emphasis added).

As a matter of statutory construction, it was not the legislative intent behind the loitering provision to prevent public harassment, to avoid a public "nuisance" or to prevent "indiscriminate sexual solicitation",

¹⁷ The Penal Law sections affecting sex are at Appendix A hereto.

unrelated to the illegality of the ultimate sex act. Instead, the Statute's purpose was to provide an inchoate offense, similar to solicitation and attempt offenses, to aid in preventing violations of P.L. §130.38. Public protection against harassment and other actually offensive conduct was available under other statutes [e.g. harassment, P.L. §240.25; disorderly conduct, P.L. §240.20; criminal nuisance, P.L. §240.45] or could be further protected by additional, "properly drafted" legislation (Cert. App. B, 2b).

The Court of Appeals' construction of the loitering law is rational and consistent with the statutory scheme. This Court cannot review the correctness of that construction, and the State's request for such review is inappropriate.¹⁸ *United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971). A brief review of New York's statutory scheme will, however, confirm this analysis of the meaning of the decision below.

The New York Statutory Scheme

Penal Law Article 130 covers sex offenses generally and, with the exception of the consensual sodomy provision (P.L. §130.38), covered only nonconsensual sex acts (whether without consent in fact or by operation of law). Commercial sex offenses are covered by Article 230. Adultery is proscribed in section 255.17, within the article dealing with the protection of the marriage institution. All of these offenses are result-oriented, being considered evil in themselves, whatever actual harm may occur in particular instances.

¹⁸ The State challenges the Court of Appeals' interpretation of the statute (State's Brief, 10-12, 20), pointing out what that "court ignored in its assessment of the purview of the statute" (*id.* 11). The State then builds its case on its own statutory interpretation (*id.* 11-12, 24, 29) and on the opinion of the dissenting judge below (*id.* 14, 18). However, it is the majority opinion below which binds this Court.

Contrasted to these are the place-oriented offenses, which include: (1) public lewdness (P.L. §245.00), (2) deviate-sex loitering (P.L. §240.35-3), (3) prostitution-purpose loitering (P.L. §240.37) and, to the extent they apply to sex-related activities, (4) harassment (P.L. §240.25) and disorderly conduct (P.L. §240.20).

Public lewdness, prohibiting exposure of "the private or intimate parts of his body in a lewd manner or commission of any other lewd act . . . in a public place", would apply to any public sex act, not simply to "deviate sex". Solicitation for such a crime is already provided by Penal Law §100.00.¹⁹

As to private sex acts, the Legislature intended no proscription of "normal" sex (absent adultery). To avoid the appearance of condoning it, however, "deviate" sex was outlawed.²⁰ Here, however, a husband-wife exception was created (P.L. §130.00-2). That exception did not apply to public lewdness,²¹ further confirming the conclusion that the consensual sodomy law was intended to reach private sex only (where a husband-wife exception would be at least understandable; it would be absurd to attribute to the Legislature an intent to permit married persons to commit "deviate" sex in public, while denying that right to others).

Moreover, the court's conclusion that P.L. §240.35-3 served only a supportive role to the consensual sodomy statute (P.L. §130.38) is supported by legislative history.

¹⁹ Moreover, the Court of Appeals has left clear power to the Legislature to add further prohibitions of a "general nature . . . properly drafted". *People v. Uplinger*, Cert. App. B, 2b.

²⁰ Memorandum, Assemblyman Richard J. Bartlett, Chairman, N.Y. State Temporary Commission on Revision of the Penal Law and Criminal Code (the "Commission"), N.Y. State Legislative Annual, 1965, 51 at 52; Message, Hon. Nelson A. Rockefeller, Governor, July 20, 1965, McKinney's 1965 Session Laws of New York, 2120-21.

²¹ The "deviate sexual intercourse" definition applied only "to this article" [Article 130]. P.L. §130.00.

The proposal originally was to reach any lewd or sexual purpose, not just "deviate sex".²² In the 1965 legislative session, however, the recommendation was limited to "deviate" sex purposes only²³ and the consensual sodomy prohibition was added.²⁴ As the Court of Appeals has now ruled, the result was a limited loitering provision designed to aid in the prevention of the illegal act of consensual sodomy in a private place.²⁵

While the loitering statute, by its terms, is applicable to any "deviate" sex, homosexual or heterosexual, the former Penal Law was directed specifically at male homosexuality. Former N.Y. Penal Law §722-8, as amended (1964). Police practice under the new statute, but prior to *People v. Onofre*, *supra*, was to enforce the loitering provision only against gay men. With the inability to use the consensual sodomy law (Penal Law §130.38) after *Onofre*, the police began to use the statute against suspected prostitutes and their customers (J.A. 61, 106-108; trial court decision, Cert. App. D, 2d-3d), but apparently not against other heterosexuals.

²² Study Bill, N.Y. Senate Int. 3918, Assembly Int. 5376, 1964 Legislative Session, Section 250.15-3. The loitering provision was recommended to deal with one of a "group of acts" which involve no intent to cause either public or individual alarm but "which are deemed generally unsalutary or unwholesome from a social viewpoint". Third Interim Report, N.Y. Commission, *etc.* page 27, February 1, 1964 [Leg. Doc. (1964) No. 14]; see, also, Commission Staff Notes, Article 250, pages 387-388, appended to Study Bill, *supra*.

²³ Fourth Interim Report of the Commission, page 49, February 1, 1965 [Leg. Doc. (1965) No. 25]; see P.L. §240.35-3 (1965).

²⁴ N.Y. Laws of 1965, ch. 1038.

²⁵ The narrow construction below conforms to the policy of the New York Court of Appeals to restrict broad-language statutes in the sex and indecency area. "Statutes punishing indecent exposure, though broadly drawn, must be carefully construed to attack the particular evil at which they are directed." *People v. Price*, 33 N.Y.2d 831, 832, 307 N.E.2d 46 (1973).

The opinion below did not discuss the Susan Butler facts. Implicit, however, is the finding that Butler's conduct fell without the statute's scope; she should have been prosecuted for public lewdness (P.L. §245.00) or for prostitution-loitering (P.L. §240.37). Solicitation for a crime such as public lewdness, is already provided by P.L. §100.00.

POINT III

New York Loitering Law §240.35-3 violates the First Amendment right to freedom of speech.

Uplinger's arrest became assured with his utterance of the words: "[I]f you drive me over to my place . . . I'll blow you."²⁶ We evaluate, therefore, pure "speech", just as the message on Cohen's jacket was pure "speech". *Cohen v. California*, 403 U.S. 15 at 18-19 (1971). The State contends that the primary purpose of the loitering law was to prevent "solicitations" (State's Brief, 29). Solicitations, however, are speech, entitled to First Amendment protection. *Bigelow v. Virginia*, 421 U.S. 809 at 818, 826 (1975).

It is likely that the Statute is unconstitutional in all of its possible applications.²⁷ As applied to Uplinger, the Statute is unconstitutional. Additionally, respondent argues the free speech rights of others under First Amendment overbreadth principles.²⁸

²⁶ The element of "loitering" added nothing; by itself, it was innocent activity. Compare *Papachristou v. City of Jacksonville*, 405 U.S. 156 at 163-164 (1972).

²⁷ Based on the apparent state interpretation of the Statute (see Point II, *supra*), the loitering provision may reach only constitutionally protected speech.

²⁸ "Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge." *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972); see *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981).

The question presented is whether a state may absolutely proscribe:

- [1] private conversation in a public place,
- [2] between two adults voluntarily conversing with each other,
- [3] with no indication of possible offense by one if an intimate proposal were to be made by the other and no reckless disregard by the one of the other's probable feelings,
- [4] where the conversation cannot be overheard by others and is not accompanied by offensive, observable, physical conduct, and
- [5] where the conversation includes an intimate proposal that the two of them go to a private residence,
- [6] to engage in a legal and private sexual encounter,
- [7] having no commercial overtones.

In short, to what extent can a state make criminal the private, non-commercial, intimate conversations and associations of its citizens, occurring discreetly on the public streets?

General Principles

Privileged speech is not simply speech which communicates ideas or discusses issues [*but cf.* State's Brief, 12]; it is also speech which is emotive [*Cohen v. California, supra* at 25-26], merely entertaining [*Winters v. New York*, 333 U.S. 507, 510 (1948); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981)], or commercial [*Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1977)]. Speech on merely private concerns is not excluded from protection. *Connick v. Myers*, _____ U.S. _____ (1983), 75 L.Ed.2d 708, 720. This Court has considered the degree to which speech may be regulated on the basis of

content [see, e.g., *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63 *et seq.* (1976)]. Even where content regulation is allowable, government must take a posture of "absolute neutrality . . . ; its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator." (*Id.* at 67).

In weighing First Amendment interests against conflicting regulatory desires, preference is given to a requirement that, wherever possible, the offended observer respond by "averting his eyes" and thereby avoid the source of offense. *Cohen v. California*, *supra* at 21. Only when speech invades "substantial privacy interests . . . in an essentially intolerable manner" may government regulate the speech. "Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Id.*

However, reasonable time, place and manner restrictions may be imposed on protected speech, assuming the neutrality required by this Court. In such cases, however, narrowly defined regulation is required instead of outright prohibition. *Schad v. Borough of Mount Ephraim*, *supra* at 74-76; *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978).

"Access to the 'streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly. . . . Free expression 'must not, in the guise of regulation, be abridged or denied.'" *Grayned v. City of Rockford*, 408 U.S. 104, 117 (1972).

Respondent Uplinger is cognizant of the disagreement within this Court whether and to what extent offensive language should be subject to governmental regulation.

See *Federal Communications Commission v. Pacifica Foundation*, *supra* at 744-748 (1978); *id.* at 761-762 (Powell, J., concurring) and at 762, *et seq.* (Brennan, J., dissenting). Thus far, this Court has upheld the principle that, however vulgar and distasteful language may be, it is entitled to First Amendment protection as long as it is not obscene in the constitutional sense. Whatever regulation of the time, place and manner of speech may be appropriate for speech which is not obscene, it is unacceptable in our traditions that it should be denied First Amendment protection on an evaluation whether it contains any meaningful ideas. *Winters v. New York*, *supra* at 510 (*but cf.* State's Brief, 6, 12).

Free Speech Exceptions Not Applicable

The recognized exceptions are not applicable. Those suggested by the State are (a) obscenity, (b) illegal acts, (c) protection of minors and (d) "fighting words".

1. *Obscenity*

New York seeks to justify the statute by its purpose to protect the public from harassing, indiscriminate solicitations of a "lewd and intimate kind" (State's Brief, 29). Uplinger's speech, "by any community standard [was] lewd if not obscene". *Id.* at 13.

If the State claims the words were obscene, it proposes no justification for that proposition under principles of *Miller v. California*, 413 U.S. 15 (1973). Recognizing "the inherent dangers of undertaking to regulate any form of expression", this Court there required as a condition of prohibiting allegedly obscene, written communication: (a) depiction or description of sexual conduct, (b) specific definition of the conduct by state law, (c) limitation of such determination to works which were prurient, when taken as a whole, (d) which portrayed sexual conduct in a patently offensive way and (e) which lacked any serious literary or other purpose. *Id.* at 23-24.

But "lewdness", like obscenity, should depend more "upon nuances of presentation and the context of its dissemination" [*Paris Adult Theatre I v. Slaton*, 413 U.S. 49 at 84 (1973), Brennan, J., dissenting] than upon automatic proscriptions of particular words or ideas. "[S]ex and obscenity are not synonymous.... Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." *Roth v. United States*, 354 U.S. 476, 487 (1957).

The State assumes Uplinger's comments were "undeniably lewd" (State's Brief, 6), "if not obscene" (*id.* 13). What constitutes "lewdness" in American law is uncertain;²⁹ certainly, however, the words used by Uplinger were not obscene. See *Federal Communications Commission v. Pacifica Foundation*, *supra*; cf. P.L. §235.00. Moreover, if the language was subject to prohibition in a public place, the statute did not give the specific notice that constitutional law requires. See *Miller v. California*, *supra* at 24; *Cohen v. California*, *supra* at 19.

Uplinger might have invited Nicosia home to engage in "oral sodomy", to "make love", to "stay for the night" or to "have sex", but his actual words were colloquial and sufficient for the occasion, without "portraying sex in a patently offensive way". P.L. §235.00. Even if the words were offensive, the offense was not in the "form of his communication . . . perhaps because it [was] too loud or too ugly in a particular setting" [*Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 547 (Stevens, J. concurring)], but in Uplinger's "message", the idea conveyed. *Id.*, 548.

²⁹ See, e.g., *Pryor v. Los Angeles Municipal Court*, 25 Cal.3d 238, at 246-247, 599 P.2d 636, at 640 (1979).

But the State cannot control the "message" if it is to maintain neutrality. It has not demonstrated that Uplinger's words were lewd under the circumstances uttered. Nor does the Statute make any distinction between lewd and non-lewd delivery of the proscribed "message".

The correct constitutional principle, respondent urges, is this: Private discussion of potential sexual conduct with one other person, in the context of a continuing conversation under circumstances in which the sexual overtones have been established and accepted by both parties, cannot, as a matter of constitutional law, be obscene.

2. *Incitement to crime*

The State argues the loitering statute is concerned with soliciting criminal, as well as non-criminal, acts.³⁰ State's Brief, 11-12. The short answer is that the Court of Appeals has construed the statute otherwise. (See Point II, *supra*.) As to the former crime of consensual sodomy, it ceased being a crime before Uplinger was arrested (with the denial of certiorari by this Court in *People v. Onofre, supra*). Without regard to the correctness of the *Onofre* decision (*supra*, 51 N.Y.2d 476), Uplinger was entitled to rely on the judgment striking down the consensual sodomy statute. *Ex post facto* considerations and due process standards of fair notice require this result. *Bowie v. City of Columbia*, 378 U.S. 347, 353 (1964); *People v. Heller*, 33 N.Y.2d 314, 330, 307 N.E.2d 805, 814 (1973).

The State attempts to garner support by binding this statute with the need to control prostitution. State's

³⁰ Compare trial court decision, Cert. App. D, 6d-7d. The culpability of the non-prostitute homosexual for "gay hustler" activities is on the order of the responsibility of the heterosexual male office worker for the street prostitute; to her, he is a potential customer.

Brief, 13, 21. By tolerating deviate-sex-soliciting conversation, it is claimed, "prostitution activities will flourish unchecked". *Id.*, 21.³¹ The unspoken premise is that laws against loitering for the purpose of prostitution (P.L. §240.37) and the various prostitution crimes (App. A, *infra* at 2a) do not work. However, it is an extravagant, unsupportable doctrine that would withhold constitutional rights from the law-abiding in order to make apprehension of criminals more certain.³²

3. *Protection of minors*

The State emphasizes this concern. State's Brief, 18-20. The Statute nowhere mentions protection of children as one of its objectives. The reviser's comments explaining the similar Model Penal Code provision (State's Brief, 14) omit reference to concerns for child welfare. This is not a statute, like those in *New York v. Ferber*, _____ U.S. _____ (1982), 73 L.Ed.2d 1113, and *Ginsberg v. New York*, 390 U.S. 629 (1968), where New York has adopted protective legislation for children. Nor is the mode of communication one which carries with it a risk that minors will necessarily be exposed to the speech. Contrast *Federal Communications Commission v. Pacifica Foundation*, *supra* at 732. New York minors, in addition to being protected by general statutes relating to harassment, disorderly conduct, public lewdness, *etc.*, are protected by P.L. §260.10 (Endangering the welfare of a child; see App. A, *infra*, at 2a). If more is needed, new statutes can be enacted. See *New York v. Ferber*, *supra*.

³¹ The State takes no note of the fact that solicitation for "normal" sex is permissible in New York. Why does this not make prostitution "flourish unchecked"?

³² Reference to crimes such as bestiality, necrophilia, sexual sadism or masochism and forceful insertion of foreign objects in the body (State's Brief, 11), as possible reasons for the loitering law, is made for the first time before this Court. The suggestions are extreme and unsupportable.

4. "Fighting words"

The State urges a greatly expanded "fighting words" exception. If the hearer would probably "experience embarrassment, annoyance or harassment" (State's Brief, 17-18), would probably feel the need to respond (*id.*, 14-15) or would be concerned about a possible "public incident" (*id.*, 17), the exception should be applied. Since "deviate" sex "is presumptively more offensive to the greater portion of the public" (*id.*, 28), it is permissible to create a conclusive presumption of offensiveness and harassment from the language, whatever the facts may be in the particular instance.³³ *Id.* Actual violence or public disorder would be "but an extreme of the harm which could result from the public context of the solicitation". *Id.*, 15.

The State presents the same issue which was presented in *Cohen v. California*, *supra* at 22-23. There, the question was whether the particular four-letter word could, by California law, be excised "from the public discourse, either upon the theory . . . that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary." *Id.* (Emphasis added). This Court should disallow the effort here, as it did in *Cohen*.

While offense to the sensibilities of the hearer formed an alternative part of the original "fighting words" concept [*Chaplinsky v. New Hampshire*, 315 U.S. 568,

³³ The State would allow conversations with strangers, including a polite inquiry whether they were homosexuals. State's Brief, 22. Presumably, that would be as offensive to many as actual solicitation. (Compare *Connick v. Myers*, _____ U.S. _____ (1983), 75 L.Ed.2d 708, at 723: "Questions, no less than forcefully stated opinions and facts, carry messages. . .") An affirmative answer to the inquiry, however, would remove any rational basis for outlawing actual solicitation; the legislative finding of *per se* offensiveness would no longer apply.

572 (1942)],³⁴ this Court no longer defines the "fighting words" exception on that basis. Only when there is a real possibility of breach of the peace is the exception applicable. Where no particular person was insulted [*Cohen v. California*, *supra* at 20], no one in fact was "violently aroused" [*id.*] and there was no showing that the speaker intended any such result [*id.*], the "fighting words" doctrine did not apply. Shock or disapproval of the content of the speech is never enough to justify restriction. *Street v. New York*, 394 U.S. 576 at 592 (1969).

Accordingly, for "fighting words" to apply, there must be a showing that the speaker intended to violently arouse and that he, in fact, did so. "Fighting words" consist of "face-to-face, abusive and insulting language likely to provoke a violent retaliation" [*Gooding v. Wilson*, 405 U.S. 518, 530 (1972), Burger, C.J., dissenting.] The cases before this Court have invariably involved language that was clearly intended to be, and could only be understood as being, abusive, insulting, hateful, vulgar and hostile. See, e.g., *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972) (Burger, C.J., Powell, J. and Rehnquist, J., dissenting, three opinions), *Lewis v. New Orleans*, 408 U.S. 913 (1972) (Powell, J., concurring); *Brown v. Oklahoma*, 408 U.S. 914 (1972) (Powell, J., concurring). Even if this Court were to permit punishment for scurrilous, offensive language without an actual, present threat of breach of the peace (as argued by the dissenting and concurring Justices in *Rosenfeld*, *Lewis* and *Brown*, *supra*), the doctrine could not reach Uplinger's speech in this case. Uplinger intended no insult; his words were "loving" words, not "fighting" words. Uplinger sought Nicosia's friendship, not anger

³⁴ The state law, as construed, applied only to language directly tending to a breach of the peace. This Court's alternative definition of the exception as including words "which by their very utterance inflict injury", *id.* at 572, was dictum.

and confrontation.³⁵ On evidence sufficient to himself but, unfortunately, erroneous, he had wrongly judged that Nicosia was looking for the same kind of affection that he also sought.

Applying Principles to this Case

The State argues a case not before the Court. Indiscriminate sexual solicitation did not occur: none of the other argued offensive factual concerns were present. Uplinger spoke with Nicosia 10 or 15 minutes. Much verbal, and presumably nonverbal, communication occurred before Uplinger felt secure in asking the officer home. The conversation was calculated to determine Nicosia's sexual orientation and interests, without giving offense. Uplinger was seeking to avoid giving affront, even to the extent of avoiding the direct question whether Nicosia was homosexual. (See State's Brief, 22). It was only persistent inquiry from Nicosia as to what Uplinger "wanted to do" (J.A. 104) that finally brought an explicit response.

On Nicosia's part, in keeping with his job, he was pretending interest. When the solicitation was made, however, he adopted the "strict liability" assumption of affront. He was in fact neither interested nor affronted; he was just doing a job. But for the fact that he was "on assignment", there was ample opportunity for him to have indicated genuine disinterest early in the conversation, with sure avoidance of any embarrassing turn to the discussion.³⁶

³⁵ See *Pryor v. Los Angeles Municipal Court*, *supra*, 25 Cal.3d at 252, 599 P.2d at 644, fn. 7. Compare *Erznoznik v. City of Jacksonville*, 422 U.S. 205 at 210-211, fn. 6 (1975).

³⁶ Nicosia was not a "captive audience" [State's Brief, 16]. He was, to his knowledge, in an area where homosexuals met, in the early hours of the morning, under conditions which predictably could put him in touch with gay people. He found what he was looking for.

Contrast *State v. Phipps*, 58 Ohio St.2d 271, 389 N.E.2d 1128 (1979), where blunt, immediate and indiscreet inquiry led to a conviction upheld under a statute which, as construed, required application of the "fighting words" exception.³⁷

Both California and Massachusetts, by narrowing constructions to their solicitation statutes, have imposed the requirement that (a) the actor "know or should know" of the presence of a person "who may be offended by [the] conduct" (the lewd conduct involved being specifically identified) and (b) that any solicitation, to be punishable, must occur in public and must be for a sex or other lewd act intended to be performed in a public place. *Pryor v. Los Angeles Municipal Court*, 25 Cal.3d 238, 256-257, 599 P.2d 636, 647 (1979); *Commonwealth v. Sefranka*, 308 Mass. 108, 414 N.E.2d 602, 608 (1980). The person who may be offended, of course, may be the addressee of the solicitation or anyone overhearing the conversation.

This Court must evaluate the interests cited by the State and, further, determine whether those interests can be met by a narrowly drawn statute, in place of the legislation before the Court. *Schad v. Borough of Mount Ephraim*, *supra* at 70-71. The *Phipps*, *Pryor* and *Sefranka* cases provide models of such narrow legislation. Additionally, New York may broaden the coverage beyond the models; indiscreet, overt and obtrusive public invitation for sex to be performed in a private place may certainly be subjected to appropriate punishment or control.

The present loitering statute, however, is unlimited in scope. It lends itself to discriminatory enforcement. The District Attorney's apprehension about the consequences

³⁷ The court defined the "fighting words" concept in terms of *Chaplinsky*, including the sensibilities dictum. However, the case was actually decided on the imminent breach of the peace basis.

of its demise is the same "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression". *Cohen v. California*, *supra* at 23.

Robert Uplinger's conduct would not offend any properly drawn, narrow statute. Even if it were assumed that Uplinger's invitation could have been made illegal (an untenable position, respondent argues), that result could not be reached under the present, broadly written statute. *Gooding v. Wilson*, *supra* at 520-521.

Government is not the best arbiter of the affective bonding which occurs between human beings. How we express our attraction to each other, establish acquaintance, secure relationships of affection and intimacy, and feed that part of the human spirit which craves friendship, love and attachment, is best dealt with by private, day-to-day, "negotiated" arrangements with others. No one can explain why attraction exists in given situations—what draws A and B together out of the myriad other possibilities available. Beyond establishing boundaries to assure that the relationships are in fact consensual, not part of a general commerce in what should be a non-commercial milieu, and, finally, not destructive of interests needing special protection (e.g. children, marriage), American law generally leaves these intensely personal and private decisions to the individual.

One sheds much of his privacy when he ventures out of his home, but not all privacy rights are lost. The intrusion on one's privacy which can occur in a public place [*Kovacs v. Cooper*, 336 U.S. 77, 87 (1949); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring); *Cohen v. California*, *supra* at 21, 22 fn. 9 and text] is the basis of the State's argument (State's Brief, 8-9, 17). A private conversation does not cease to be private simply because it is on a public

street. See *Katz v. United States*, 389 U.S. 347, 351-352 (1967). One's privacy right (here grounded on First and Fourth Amendment principles) should assure that his lawful, private speech, uttered discreetly and politely, without either intent or expectation that it would offend, and seeking no unlawful end, will not require justification before any court. This, respondent believes, is the basis of the Court of Appeals' holding that "this statute, therefore, suffers the same deficiencies as did the consensual sodomy statute" (Cert. App. B, 2b).

Less restrictive burdens are appropriate for oral speech than for written communication. The one is fleeting in time and limited in impact; the private listener can "move on" in his life and put it behind him. Written communication, by contrast, is capable of wide distribution and, if obscene, lewd, libelous or otherwise afflicted, capable of greater harm. It is appropriate, therefore, that any doubts here be resolved in favor of the respondent and the free, unfettered exercise of his First Amendment rights in this oral speech.

Finally, contrary to the State's claim of the offensiveness of Uplinger's invitation to Nicosia, that conversation was much less potentially offensive than others previously before this Court. The comments were not in front of a large audience [contrast, *Rosenfeld v. New Jersey* and *Brown v. Oklahoma*, *supra*] or broadcast by radio [*Federal Communications Commission v. Pacifica Foundation*, *supra*]. Its potential impact on the public was minimal.

We have so far assumed, for argument purposes only, that Uplinger's statement to Nicosia did not consist of "ideas". However, he in fact was expressing an idea—both in the declaratory style of his statement and in the message given. It was not simply the information of the availability of a certain experience. More importantly, it was the implied message: "It's ok; I know

what you want. You do not have to be afraid. It's alright to be gay and to do something about it."

In *Miller v. California*, *supra* at 18-19, this Court allowed control of obscenity in a context where "the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles". No less exacting standard should be required where non-obscene speech is being examined. The Uplinger communication carried no "significant danger" of anything other than that the content would offend majority sensibilities, if, unexpectedly, the conversation came to public attention.³⁸

POINT IV

New York Penal Law §240.35-3 infringes on the First Amendment right to freedom of association.

All that has been said of Uplinger's right to free speech is equally applicable to his right of freedom of association. That freedom is not restricted to associations which are "political in the customary sense" but includes those which "pertain to the social, legal, and economic benefit of the members." *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965), as quoted in *Sawyer v. Sandstrom*, 615 F.2d 311, 316 (5th Cir. 1980).

Note, also, *Coates v. City of Cincinnati*, 402 U.S. 611 at 615 (1971):

"The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people."

³⁸ The State asserts actual harm occurred from Uplinger's solicitation of Nicosia on no basis whatsoever (State's Brief, 20). The pre-trial hearing did not deal with the Uplinger solicitation at all, only with the abstract "problem". How severe a problem exists may be in doubt [see trial court decision, Cert. App. D, 5d-6d], but there was no evidence that Uplinger was there on other occasions or had caused any harm to anyone.

Implicit in the prohibition of the loitering statute is the effort to discourage respondent Uplinger from meeting new people and, where considered personally suitable, to invite them to his home for any lawful purpose—including intimate sexual relations. Respondent acknowledges the appropriateness of time, place and manner regulations of a subject as intimate as personal sex. But the subject statute makes no effort to distinguish between that conduct which would offend and that which would be designed not to offend. Given the common knowledge that there is a substantial minority of homosexual persons in this country,³⁹ this Court can readily infer the importance of the freedom that they assert to meet each other in public, to make new acquaintances and to comport themselves in a discreet, non-harmful and personally satisfying manner in the course of the exercise of their right of assembly and association. (See J.A. 93-95).

The right of assembly and association includes the opportunity for such gatherings "to further . . . personal beliefs". *Healy v. James*, 408 U.S. 169, 181 (1972). In assessing claims under this heading, the Court is concerned with the "practical effect" of whatever governmental action is at issue (*id.*). While no "direct action" may have been taken to deny assembly/association rights, the First Amendment claim may be grounded on indirect encroachments as well. [*Id.* at 183; *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960)].

³⁹ In addition to the general visibility of homosexuals and homosexual activists in current news and events, consider the findings, as to the incidence of homosexual acts, in such works as Kinsey-Pomeroy-Martin, "Sex Behavior in the Human Male", W.B. Saunders Co., 1948, pages 610, 628, 650-651; National Institute of Mental Health: Task Force on Homosexuality, "Final Report and Background Papers". Edited by John M. Livingwood, M.D. [U.S. Government Printing Office, Stock No. 1724-0244; DHEW Pub. No. (HSM) 72-9116, printed 1972]. Cf. *Baker v. Wade*, *supra* at 1129 (appeal pending).

Here, the State has passed a broadly worded, vague statute [see Point VII below], which, in effect, cautions gay people especially against meeting each other in public places and becoming "visible", lest they be subjected to control through a "round-up" type of law enforcement undertaken without regard to the relatively narrower core purpose of the statute. Moreover, the policies enunciated by witnesses and the Court at the hearing confirm that the Statute is enforced in Buffalo in a way designed to implement majority desires little related to actual law violation by the subjects of the enforcement. People do not want "suspected homosexuals" (J.A. 18, 108, 119, 124) "hanging around" (J.A. 62, 119). Presence of homosexuals in an area is a factor adversely affecting the interests of businessmen and property values of homeowners. (See trial court decision, Cert. App. D, 5d-6d).⁴⁰ The clear preference would be that the young males, presumably homosexuals, would meet each other at gay bars and not where members of the public had to observe them using the streets for socializing purposes (J.A. 39, 57-58, 78, 121; trial court decision, Cert. App. D, 9d). The attitude was epitomized by the trial court's question why it was

⁴⁰ Although the trial court spoke in terms of the "soliciting in front of or near their homes and businesses" being the cause of the presumed lower values, the testimony did not support this. Timothy McCarthy, the homeowner who testified (J.A. 30, *et seq.*) was concerned about "gatherings of young males" but he did "not know their purposes specifically" (J.A. 31). While these males had done nothing overtly to annoy or harass him, he was psychologically impeded from going out from his own sense of "apprehension", all resulting from merely "walking by six or seven fellows congregating on the street corner" (J.A. 35). The businessman who testified was Robert Freudenheim (J.A. 41, *et seq.*). He observed young men in the area, just standing around (J.A. 42). He had received no specific complaints from his tenants. While the people on the street were generally quiet (J.A. 44), the fact that they were groups of young males rather than mixed groups of men and women and that they were simply loitering on the street made them undesirable to him (regardless of their purpose) (J.A. 44-46).

"necessary" for gay people to meet each other on the street (J.A. 56).⁴¹ Clearly, the desire of the police is to use the law primarily as an anti-loitering provision, to deal with perceived problems other than mere sex solicitation.⁴²

The indirect effect of this broadly-worded and vague statute, therefore, is to abridge the rights of Uplinger and other gay people to freely assemble and associate.

POINT V

There is no compelling state purpose justifying the First Amendment restrictions imposed by the statute.

The State must demonstrate a compelling state purpose to justify restrictions on the exercise of First Amendment rights. *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963). The State argues that it has compelling interests here: [1] fostering the "guarantee of free trade of ideas" (State's Brief, 16), [2] preventing the public from becoming a "captive audience" (*id.*, 17), [3] protecting the privacy of members of the public (*id.*, 18), [4] protecting minors (*id.*, 18-19), [5] dealing with youth "hustlers" (*id.*, 19-20), [6] avoiding public nuisances (*id.*, 20) and [7] preventing criminal acts (*id.*, 20-21).

⁴¹ Councilman Marcy's answer to the court's question related to prostitution. While the hearing related to non-prostitution activities and that was the case with Uplinger, Marcy was speaking only of the problem of enforcing prostitution laws, not about restricting gay people generally (J.A. 59).

⁴² Chief Kennedy testified: "I would say there's a crying demand for legislation and for a law to what we have now, the loitering law, to be effective in responding to complaints of groups of people say who are homosexuals saturating the area, committing other disorderly acts, urinating on their grass and so on and so forth, and walking up and down and soliciting people and I'd say that we have a prime need to . . . control this or do something to prevent this from happening and to respond to the public demand for police services" (J.A. 125).

The State would protect "free trade of ideas" by prohibiting the expression of the idea uttered by Uplinger (*id.*, 16). This would be done without regard to whether there were persons to whom that idea was important, perhaps vital to their emotional and social health. The State then would twist the "captive audience" concept out of all recognition. That concept, as a restriction on free speech, is appropriate where it is virtually impossible to avoid the message by exercising free choice; but no immediate, reckless or indiscriminate solicitation occurred here. Nicosia, had he been a private person uninterested in getting involved with Bob Uplinger and not on official assignment to await a solicitation, would either not have participated in the conversation or would have made his disinclination apparent before any solicitation occurred. This was no loudspeaker case (*Kovacs v. Cooper, supra*) or instance of political advertising on a public transit utility (*Lehman v. City of Shaker Heights, supra*). Nicosia could simply walk away any time.

All of the other "compelling interests" mentioned form no part of the Statute's purpose, as construed by the Court of Appeals, and are fully covered by other sections of the Penal Law. (See Appendix A, *infra*.)

There is another public policy of the State of New York now reflected in Governor Cuomo's Executive Order No. 28, issued November 18, 1983 [Appendix B hereto]:

"In this case, this statement and Executive Order are clear. Their essence is that our government cannot promote any religion, creed, belief or lifestyle without thereby threatening all others. This is an argument for securing freedom by insisting on neutrality. It is a proposition that is at the very foundation of our nation's strength. We ought never be embarrassed nor afraid to repeat it." (Appendix B, *infra*, at 9a).

That statement, made with respect to State policy toward homosexuals, but in a different context, applies equally here.

POINT VI

The Statute is discriminatory, underinclusive and a violation of respondent Uplinger's right to the equal protection of the laws.

Although the Commission's original proposal contemplated an all-inclusive proscription against loitering for purposes of soliciting or engaging in "lewd or sexual" conduct [see note 22, *supra*], the final proposal was limited to "deviate" sexual conduct. The primary reach of the statute is directed to homosexuals (Cert. App. D, 3d; see, *supra* at 15). In addition to the discriminatory enforcement which is in fact practiced (J.A. 61, 106-108), the statute's provisions are virtually unenforceable except as against homosexuals whose involvement in sex which is "deviate" or "of a deviate nature" is obvious.

What the present statute directly accomplishes is avoidance of injury to the male ego from the possibility of being solicited for a homosexual act. What the State has a legitimate interest in, however, is providing a reasonable protection to all members of society against offensive or harassing sexual solicitations of any kind. A sexual approach by a man to another man, perhaps in a gay bar, for example, would be punishable under the Statute. The character of the proposed conduct as being "deviate" or "of a deviate nature" would be clear by the gender of the proposed participants. Because the Statute makes no effort to reach seduction approaches of a man to a woman, say, in a modern singles bar, the invitation there to come home and engage in sex is unaffected by the law.

The issue presented is whether there is "some ground of difference that rationally explains the different treatment accorded" different classes of persons. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). If nuisance and harassment involved in sexual solicitation is the

reason for the statute, there is no conceivably satisfactory difference between offensive solicitation of males by homosexual males and the offensive solicitation of females by heterosexual males. The true explanation, respondent submits, is the culturally ingrained attitudes of a male-dominated society which view women as sexually submissive objects of male sexual aggressiveness. These attitudes assign to women the burden of receiving truly indiscriminate sexual solicitations (frequently of a grossly offensive nature) with no legal recourse whatever, while assuring that male machismo assumptions will be fully protected by available legal penalties, independent of any requirement for *mens rea*. (See State's Brief, 28).

POINT VII

The statute violates due process (a) by having no legitimate state purpose and (b) by being unconstitutionally vague.

As previously noted, the State has not demonstrated the compelling state purpose needed to justify the loitering provision's impact on First Amendment liberties. Additionally, the Statute fails to provide even a rational state purpose, insofar as it fails to connect the "loitering" element with a legitimate proscribed activity. This failure, coupled with the generally vague provisions of the Statute, renders the law unconstitutionally vague.

The beginning principle is that the citizen has a fundamental right to the use of the streets for such purposes as do not interfere with the rights of others. "The right to use a public place for expressive activity may be restricted only for weighty reasons." *Grayned v. City of Rockford*, *supra* at 115; see, also, *Sawyer v. Sandstrom*, *supra* at 316. Among the appropriate uses of the streets is the exercise of the right of association, covering, as it does, associations which are social in

nature, not just political relationships. *Griswold v. Connecticut*, *supra* at 483.

A loitering law, however, like the rest of the vagrancy-type statutes, is typically a device "for preventing crime and for removing so-called nuisances—mobs and individual 'undesirables'—from public places". *United States ex rel. Newsome v. Malcolm*, 492 F.2d 1166, 1172 (2d Cir. 1974), *aff'd sub nom. Lefkowitz v. Newsome*, 420 U.S. 283 (1975). The typical defects of such a statute are shared by P.L. §240.35-3:

"[B]ecause the *crime* prevention components of loitering statutes are aimed at suspected or potential rather than incipient or observable conduct, they may conflict with the deeply rooted Fourth Amendment requirement that arrests must be predicated on probable cause.... [Such a loitering statute] imposes criminal liability in the absence of criminal intent, a factor noted by the Supreme Court in *Papachristou*, 405 U.S. at 162...." [*Id.*, emphasis added]

"Moreover, there are insufficient guidelines for enforcement and thus §240.35(6) does not pass constitutional muster on this ground as well. . . . To the extent the statute can be interpreted to support dragnet, street-sweeping operations *absent probable cause of actual criminality*, it conflicts with established notions of due process." [*Id.* at 1173, emphasis added]

While the statute in *Newsome* was the same kind of broad, almost unlimited dragnet statute as was involved in *Papachristou v. City of Jacksonville*, *supra*, the "deviate"-sex loitering law shares the same defects for conduct prior to actual solicitation. Uplinger has standing to argue unconstitutionality on that ground, first, because the statute affects First Amendment

rights and overbreadth argument should be allowed⁴³ and, second, because Uplinger himself has presumably been arrested, in part, for his conduct ("loitering") before actual solicitation, not merely for one isolated act of solicitation.

If this be so, however, Uplinger's "loitering",⁴⁴ informed by a standardless provision relating to his "purpose", has been transformed into a solicitation offense, where no anti-solicitation statute existed.⁴⁵ And the law enforcer has a prime opportunity for arbitrary enforcement, knowing well the vulnerability of most men to exposure and obloquy resulting from merely being arrested for such an offense. (See J.A. 26.)

When a gay man socializes with friends or acquaintances in a public place, he exercises freedoms of speech and association. Assuming it is his intent to refrain from direct solicitation for "deviate" sex, what must he do, nonetheless, to avoid being in violation of the statute? What words should he not say lest he betray too much attraction to another man in the presence of an undercover officer? If he does form the purpose in his mind, however fleetingly, to invite a fellow gay person home for sex, has he become a violator? Will that violation be betrayed by a wink? A smile too eager?

⁴³ Overbreadth and vagueness are "logically related and similar doctrines" and "facial challenges [are appropriate] in situations where free speech or free association are affected". *Kolender v. Lawson*, *supra*, 75 L.Ed.2d at 910, fn. 8).

⁴⁴ "Loitering", under New York law, is inherently innocent conduct, like "lingering". *People v. Bell*, 306 N.Y. 110, 113, 115 N.E.2d 821, 822 (1953); compare *Papachristou v. City of Jacksonville*, *supra*, at 163-164 (1972).

⁴⁵ N.Y. Penal Law §§100.00 and 100.05 proscribe solicitation for crimes. No New York law (other than business or professional regulatory provisions) prohibits solicitation of lawful and unregulated activity (such as private, adult, non-commercial sex), except the loitering law.

Under the Statute as written, it depends on how an officer chooses to interpret the vague provisions of the law and the extent to which that officer's own prejudices induce him to stretch the law to its maximum conceivable limits, thereby creating a different legal "standard in each case". *Gooding v. Wilson*, 405 U.S. 518, 528 (1972), quoting from *Herndon v. Lowry*, 301 U.S. 242, 263 (1937).

Four troubling consequences of this Statute affect the due process rights of targeted persons. First, the Statute's aim at one's purpose, before it is acted upon, allows prior restraint of speech and association freedoms. Second, it encourages discriminatory enforcement of an "offense" that not only has not yet occurred but may never occur. What discussion would later occur and whether this would result in actual solicitation cannot be determined in advance. The individual, possessed only of intent under American law, must be given the opportunity to withdraw from acting on that intent. Third, the Statute's language permits arrest without probable cause. See *United States ex rel. Newsome*, *supra*. Finally, in a legal system which allows punishment for solicitation of criminal acts only when the line has been crossed from "mere advocacy" to "incitement to imminent lawless action" [*Brandenburg v. Ohio*, 395 U.S. 444, 448-449 (1969)], the loitering law permits arrest, first, before any solicitation at all has occurred, and, second, where the solicitation, if made, would not even be for a crime.

Most intrusive on personal liberties, however, is the fact that the Statute defines as a violator one who is merely in a public place with a purpose—an unsatisfactory state of mind. Even without probable cause to arrest for any offense, an officer may construe the observable, but innocent, act of loitering with whatever other factor he considers significant evidence of purpose, and arrest under P.L. §240.35-3 for nothing

more than being in a public place under suspicious circumstances. But legislation in America may not be premised "on the desirability of controlling a person's private thoughts." *Stanley v. Georgia*, 394 U.S. 557, 566 (1969). Compare *People v. Gibson*, 184 Col. 444, 521 P.2d 774 (1974); *Portland v. James*, 251 Ore. 8, 444 P.2d 554, 555-556 (1968).

POINT VIII

The decision below was premised upon a proper determination that the ultimate act, sexual intimacy, was protected by the constitutional right of privacy.

People v. Onofre, supra, determined that consensual sodomy (P.L. §130.38) would no longer be a crime in New York State. That decision was determinative of that issue as to the future incident leading to this litigation, whether or not the *Onofre* legal holding was correctly determined. *Bouie v. City of Columbia, supra* at 353; *People v. Heller, supra* at 330, 307 N.E.2d at 814 (see discussion *supra* at 21). Nonetheless, against the possibility that this Court intends to consider the correctness of the *Onofre* holding as part of this appeal, respondent Uplinger makes the following comments regarding that question.

The Court of Appeals ruled in *People v. Onofre, supra*, on the equal protection question⁴⁶ as well as on the privacy issue presented directly by Ronald Onofre, himself, his act having occurred in his apartment. The privacy determination is directly relevant in Uplinger's situation, his intended act also being related to his personal residence.

⁴⁶ The Court of Appeals held in *Onofre* that the exemption of married people from the ban on consensual sodomy created an equal protection problem for those who were not married. *People v. Onofre, supra* at 491-492, 415 N.E.2d at 942-943.

The Court of Appeals could find no objective harm to the public morals or welfare which would justify governmental prohibition of private, "deviant" sex acts described in the statute:

"In light of these decisions, protecting under the cloak of the right of privacy individual decisions as to indulgence in acts of sexual intimacy by unmarried persons and as to satisfaction of sexual desires by resort to material condemned as obscene by community standards when done in a cloistered setting, no rational basis appears for excluding from the same protection decisions—such as those made by defendants before us—to seek sexual gratification from what at least once was commonly regarded as 'deviant' conduct, so long as the decisions are voluntarily made by adults in a noncommercial, private setting." *People v. Onofre*, *supra*, 51 N.Y.2d at 488, 415 N.E.2d at 940-941 (emphasis added).

Onofre acknowledged that what has in fact been upheld in the privacy decisions of this Court in *Griswold v. Connecticut*, *supra*, *Stanley v. Georgia*, *supra*, *Eisenstadt v. Baird*, *supra*, and *Roe v. Wade*, 410 U.S. 113 (1973), has been the right of the individual to decide how he would experience his sexuality, free of interference from the state, absent special factors justifying such interference.

"In sum, there has been no showing of any threat, either to participants or the public in general, in consequence of the voluntary engagement by adults in private, discreet, sodomous conduct. Absent is the factor of commercialization with the attendant evils commonly attached to the retailing of sexual pleasures; absent the elements of force or of involvement with minors which might constitute compulsion of unwilling participants or of those too young to make an informed choice, and absent too intrusion on the sensibilities of members of the

public, many of whom would be offended by being exposed to the intimacies of others. Personal feelings of distaste for the conduct sought to be proscribed by section 130.38 of the Penal Law and even disapproval by a majority of the populace, if that disapproval were to be assumed, may not substitute for the required demonstration of a valid basis for intrusion by the State in an area of important personal decision protected under the right of privacy drawn from the United States Constitution—areas, the number and definition of which have steadily grown but, as the Supreme Court has observed, the outer limits of which it has not yet marked." *People v. Onofre, supra*, 51 N.Y.2d at 490, 415 N.E.2d at 941-942.

Prior summary decisions of this Court have not dealt with the underlying issue whether the right of privacy under the United States Constitution extends to voluntary, adult, noncommercial sexual intimacy. (See, Susan Butler Brief in Opposition to Petition for Certiorari herein, at 7-13).

This Court's decisions in the privacy field have established (1) the right of married persons to determine the manner of their sexual intimacies with each other (*Griswold v. Connecticut, supra*), (2) that this same protection is available not just to married persons but to unmarried persons as well (*Eisenstadt v. Baird, supra; Roe v. Wade, supra*) and (3) that the privacy right extends even to erotic activities engaged in purely for pleasure and without the context of a heterosexual coupling, provided that the activity takes place in the home (*Stanley v. Georgia, supra*).

As stated by Chief Justice Burger, the privacy right relates to the "intimacies of the home" (*Paris Adult Theatre I v. Slaton, supra* at 65). *Stanley v. Georgia* was decided "on the narrow basis of the 'privacy of the home', which was hardly more than a reaffirmation that

'a man's home is his castle'." *Paris Adult Theatre I v. Slaton*, *supra* at 66. "The protection afforded by *Stanley v. Georgia* . . . is restricted to a place, the home." *Id.*, fn. 13. Uplinger, like Stanley, argues for the privacy of his home. His sexual activity can be limited by state law, properly drawn, to his front door.

The constitutional concept is an obvious haven for those subjected to sexual-orientation discrimination in this country.⁴⁷ At the same time that a substantial number of the states (in which live a majority of American citizens) have abandoned private sex criminal restrictions, either by legislative or judicial action,⁴⁸ and a majority of Americans apparently uphold the concept of privacy in the sexual orientation context,⁴⁹ determined community forces continue to seek to repress homosexual expression.

Whether "privacy" is viewed as a personal liberty under limited circumstances to realize one's own personality by making certain intimate and critical decisions without the interference of the state, or, instead, simply as a guaranty against physical interference (in the spirit of the Fourth Amendment guarantees), its reach at least extends to sexual intimacy decisions carried out in one's own home, participated in

⁴⁷ Report of the Commission on Personal Privacy, State of California, December 1982 (the "California Commission"), pp. 304-320.

⁴⁸ See *People v. Onofre*, *supra* at 491, 415 N.E.2d at 942, fn. 5 and source there cited: (22 states, in addition to New York, "decriminalized consensual sodomy between adults in private" as of December 1980).

⁴⁹ "The Dimensions of Privacy, A National Opinion Research Survey of Attitudes Toward Privacy", conducted for Century Insurance Company by Louis Harris & Associates, Inc., 1979, as reported in the Report of the California Commission, *supra* at 82 (70% favoring right of privacy for homosexuals engaging in private sex; 79% for heterosexuals engaging in private sex.)

by only two adults and without any of the involvements in which the state has any legitimate interest.⁵⁰ These interests do not include espousal of particular religious or philosophical disagreements with variant sexual styles having no demonstrable, resulting secular harm. See *People v. Onofre*, *supra*, 51 N.Y.2d at 488-490, 415 N.E.2d at 940-941.

The privacy analysis comes from two perspectives. First, privacy is a fundamental right—“the right most valued by civilized men” [*Olmstead v. United States*, 277 U.S. 438 at 478 (1928) (Brandels, J., dissenting)]—and while it is not explicitly contained in the Federal Constitution, it is “implicit in the concept of ordered liberty” [*Roe v. Wade*, *supra* at 152] which separates American society from most of the others in the world. This aspect of privacy includes the right to autonomy in decision-making, relating to one’s personality [*benShalom v. Secretary of Army*, 489 F.Supp. 964 at 975-976 (D.C. Wisc. 1980)], intimate relationships and manner of living—and the right to act on those decisions.⁵¹

While the right of privacy is not an absolute, it becomes most nearly so in the cloistered setting of one’s home. Therefore, the right to choose a partner for sexual intimacy and the right to choose the form that intimacy takes is protected by the confluence of two aspects of privacy, that relating to personal decisions and that relating to the special territory of one’s home.⁵² The right to privacy touches one of the oldest chords of our American jurisprudence, reflecting concepts which go back to Magna Carta. It embodies the special concern

⁵⁰ *E.g.* avoidance of adultery, protection of children.

⁵¹ See, generally, Karst, “The Freedom of Intimate Associations”, 89 Yale L.J. 624 (1980); Richards, “Sexual Autonomy and the Constitutional Right to Privacy”, 30 Hastings L.J. 957 (1979); Richards, “Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory”, 45 Fordham L.R. 1281 (1977).

⁵² Report of the California Commission, note 47 *supra*, at 37-55.

our law has traditionally manifested for the individual's ultimate dominion over his own person.

This brings us to the second perspective, which is focused not on the individual, but on the limitations on the legitimate police power of the state to interfere with non-harmful thoughts, decisions, speech and conduct of individuals. It mandates that the state have a secular and reasonable, and, perhaps, substantial or controlling, interest—a legitimate societal purpose—in interfering with the conduct of members of society.

Privacy is thus like a mighty dam: It ensures a safe and prosperous life downstream by limiting the flow of the flood above, the great power of which, if unleashed, would envelop and destroy what it nourishes and nurtures in its controlled condition. In the year of 1984, it is privacy which prevents Orwell's prediction from reaching fruition.

Conclusion

The judgment below should be affirmed.

Date: December 8, 1983

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**APPENDIX A—New York Statutory Provisions
Regulating Sexual Behavior**

1. FORCIBLE SEXUAL CONDUCT:

Penal Law §130.35 First degree rape. Male guilty "when he engages in sexual intercourse with a female: 1. By forcible compulsion." Class B felony.

Penal Law §130.50 First degree sodomy. Person guilty "when he engages in deviate sexual intercourse with another person: 1. By forcible compulsion." Class B felony.

Penal Law §130.20 Sexual Misconduct. Person guilty "when: 1. Being a male, he engages in sexual intercourse with a female without her consent; or 2. He engages in deviate sexual intercourse with another person without the latter's consent." Class A misdemeanor.

2. SEX OR OTHER OFFENSE WITH MINORS

Penal Law §130.35 First degree rape. Male guilty "when he engages in sexual intercourse with a female: . . . 3. Who is less than eleven years old." Class B felony.

Penal Law §130.50 First degree sodomy. Person guilty "when he engages in deviate sexual intercourse with another person: . . . 3. Who is less than eleven years old." Class B felony.

Penal Law §130.30 Second degree rape. Male guilty "when, being eighteen years old or more, he engages in sexual intercourse with a female less than fourteen years old." Class D felony.

Penal Law §130.45 Second degree sodomy. Person guilty "when, being eighteen years old or more, he engages in deviate sexual intercourse with another person less than fourteen years old." Class D felony.

*Appendix A—New York Statutory Provisions
Regulating Sexual Behavior.*

Penal Law §130.25 Third degree rape. Male guilty "when: . . . 2. Being twenty-one years old or more, he engages in sexual intercourse with a female less than seventeen years old." Class E felony.

Penal Law §130.40 Third degree sodomy. Person guilty "when: . . . 2. Being twenty-one years old or more, he engages in deviate sexual intercourse with a person less than seventeen years old." Class E felony.

Penal Law §260.10 Endangering the welfare of a child. Person guilty "when: 1. He knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a male child less than sixteen years old or a female child less than seventeen years old. . . ."

3. PROSTITUTION OFFENSES

Penal Law §230.00 Prostitution. Person guilty "when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee." Class B misdemeanor.

Penal Law §§230.03-230.06 Patronizing a prostitute (various degrees). Person guilty when he "patronizes a prostitute", with increasing degrees of severity depending on the age of the prostitute. Class B misdemeanor to a class D felony.

Penal Law §§230.20, 230.25, 230.30, 230.3? Promoting prostitution (various degrees). Class A misdemeanor to class B felony.

*Appendix A—New York Statutory Provisions
Regulating Sexual Behavior.*

Penal Law §240.37 Loitering for the purpose of engaging in a prostitution offense. "... 2. Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of prostitution, or of patronizing a prostitute as those terms are defined in article [230] of the penal law, shall be guilty of a violation and is guilty of a class B misdemeanor if such person has previously been convicted of a violation of this section or of sections 230.00 or 230.05 of the penal law.

"3. Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of promoting prostitution as defined in article [230] of the penal law is guilty of a class A misdemeanor."

4. PUBLIC LEWDNESS

Penal Law §245.00 Public lewdness. Person guilty "when he intentionally exposes the private or intimate parts of his body in a lewd manner or commits any other lewd act (a) in a public place, or (b) in private premises under circumstances in which he may readily be observed from either a public place or from other private premises, and with intent that he be so observed." Class B misdemeanor.

*Appendix A—New York Statutory Provisions
Regulating Sexual Behavior.*

5. LOITERING FOR DEVIATE SEX PURPOSES

Penal Law §240.35-3 Loitering. Person guilty "when he: . . . 3. Loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature. . . ." Violation.

6. HARASSMENT

Penal Law §240.25 Harassment. Person guilty "when, with intent to harass, annoy or alarm another person: . . . 2. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or 3. He follows a person in or about a public place or places; or . . . 5. He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose." Violation.

7. DISORDERLY CONDUCT

Penal Law §240.20 Disorderly conduct. Person guilty "when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: 1. He engages in fighting or in violent, tumultuous or threatening behavior; or 2. He makes unreasonable noise; or 3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or . . . 5. He obstructs vehicular or pedestrian traffic; or 6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse, or 7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose." Violation.

*Appendix A—New York Statutory Provisions
Regulating Sexual Behavior.*

8. MISCELLANEOUS OFFENSES

Penal Law §130.20 Sexual misconduct. Person guilty "when: . . . 3. He engages in sexual conduct with an animal or a dead human body." Class A misdemeanor.

Penal Law §130.70 Aggravated sexual abuse. Person guilty "when he inserts a foreign object in the vagina, urethra, penis or rectum of another person causing physical injury to such person" by force or under other conditions stated in section. Class B felony.

Penal Law §§130.55, 130.60, 130.65 Sexual abuse. Person guilty "when he subjects another person to sexual contact" under varying conditions of actual or constructive lack of consent. Class B misdemeanor to class D felony.

9. CRIMINAL SOLICITATION

Penal Law §100.00 Criminal solicitation, third degree. Person guilty "when, with intent that another person engage in conduct constituting a crime, he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct." Violation.

Penal Law §100.05 Criminal solicitation, second degree. Person guilty "when, with intent that another person engage in conduct constituting a felony, he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct." Class A misdemeanor.

*Appendix A—New York Statutory Provisions
Regulating Sexual Behavior.*

10. CRIMINAL NUISANCE

Penal Law §240.45 Criminal nuisance. Person guilty "when: 1. By conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons; or 2. He knowingly conducts or maintains any premises, place or resort where persons gather for purposes of engaging in unlawful conduct." Class B misdemeanor.

11. CONSENSUAL SODOMY

Penal Law §130.00-2. Sex offenses; definitions of terms. "2. Deviate sexual intercourse means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and vulva."

Penal Law §130.38 Consensual sodomy. "A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person." Class B misdemeanor. [Note: Declared unconstitutional, December, 1980, in *People v. Onofre, supra.*]

* Notes: Excluded are offenses involving sex with a person incapable of consent for reasons other than age (Penal Law §§130.25-1, 130.35-2, 130.40-1, 130.50-2, 130.60-1, 130.65-2) and permitting prostitution (Penal Law §230.40).

**APPENDIX B—Executive Order No. 28, Prohibiting
Discrimination Against Homosexuals in Employment
or Provision of State Services, Hon. Mario M. Cuomo,
New York Governor, November 18, 1983**

STATE OF NEW YORK

EXECUTIVE CHAMBER

No. 28

EXECUTIVE ORDER

Ours is a unique government. It was created and has been preserved by people from all over the world who came here seeking one thing above all others: freedom—freedom to believe and to act on those beliefs; freedom that says that so long as an individual's conduct and actions remain a matter of personal expression and do not deprive others of their rights, they should be neither restrained nor punished by government.

Our nation values freedom so greatly, it has been written into our Constitution. We all prize that freedom and millions have fought to protect and to extend it.

Each generation has come to understand the basic wisdom of our Constitution: that only by protecting the freedom of others can we ensure it for ourselves; that to encourage or allow government to discriminate against any belief or creed or private way of life would threaten us all. This is so because we could never be sure which particular value would dominate government at any particular point in time. Only neutrality by government was deemed safe and that is what our Constitution assures.

This freedom makes us strong. It is essential to our pluralism. It protects religious believers, and agnostics, and atheists, and political dissenters, and conservatives and liberals, creating a nation and a state where the right to live as conscience dictates is enshrined as law.

Appendix B—Executive Order No. 28.

Because of such freedom we enjoy a cultural and religious diversity unmatched by any other nation.

The freedom our Constitution grants, however, requires that government exercise a degree of tolerance unthinkable in societies less open or diverse than ours. It demands a tolerance for the privacy of each individual, a refusal to use the state as an instrument of coercion of belief or thought, however desirable the majority regards a particular belief or thought to be.

Even when this freedom is unchallenged, it is so precious to us all that our commitment to preserve it from encroachment by government deserves constant reaffirmation and reiteration. But when this freedom is questioned or when evidence of unfair discrimination exists, then our reaffirmation is not an option—it is a simple necessity.

I have seen evidence of such encroachment. As Secretary of State, I was required to issue special regulations to prohibit discrimination against individuals seeking licenses for certain occupations or corporate privileges. Up to that time such licenses were denied on the basis of sexual orientation or even presumed sexual orientation. There is no reason to believe that the discrimination apparent in that part of government was confined there.

No one argued then against my change in the State's regulations. No one was heard to say that government had no place in fighting unfair discrimination. In fact, in recognition of this, a personnel directive against discrimination in hiring was issued during the prior administration.

I suggest, respectfully, that what was right then is right now. And I believe that there is no justification for

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the failure to announce freedom from discrimination as the policy, not just of the Department of State but of this entire State government.

Indeed, the most persistent argument that has been offered in opposition to my stating the views contained in this Order does not really contradict any of them. Rather it says, in effect, we ought not to state this constitutional truth because it may be misrepresented to be something else. Specifically, it is suggested that the argument against discrimination will be distorted into an argument promoting homosexuality.

The argument is beside the mark. There is no perfect protection against distortion. Indeed one could as easily argue that silence on this issue could be distorted into an argument promoting discrimination against homosexuals.

In this case, this statement and Executive Order are clear. Their essence is that our government cannot promote any religion, creed, belief or life-style without thereby threatening all others.

This is an argument for securing freedom by insisting on neutrality. It is a proposition that is at the very foundation of our nation's strength. We ought never be embarrassed nor afraid to repeat it.

Accordingly, for all the above reasons, I am this day reiterating the law set down by the Constitution of the United States and the Constitution of the State of New York as the policy of this Administration.

Appendix B—Executive Order No. 28.

STATEMENT OF POLICY

1. No State agency or department shall discriminate on the basis of sexual orientation against any individual in the provision of any services or benefits by such State agency or department.

2. All State agencies and departments shall prohibit discrimination based on sexual orientation in any matter pertaining to employment by the State including, but not limited to, hiring, job appointment, promotion, tenure, recruitment and compensation.

3. The Office of Employee Relations is hereby directed to promulgate clear and consistent guidelines prohibiting discrimination based on sexual orientation to maintain an environment where only job-related criteria are used to assess employees or prospective employees of the State. The Office shall also implement a procedure to ensure the swift and thorough investigation of complaints of discrimination based on sexual orientation. Particular effort should be made to conduct investigations with due regard for confidentiality.

4. In order to assure that we understand fully the extent and nature of any discrimination that exists, I will appoint a Task Force, including the Commissioners of the Departments of Correctional Services, Health, Mental Health, Labor, Social Services and the Division of Human Rights, the Superintendent of State Police, the President of the Civil Service Commission, the Directors of the Women's Division, the Office of Employee Relations, the Division for Youth and the Office for the Aging, the Chairman of the State Liquor Authority and seven private citizens whom I shall designate. The Task Force shall submit such reports and recommendations as it sees fit, dealing with individuals'

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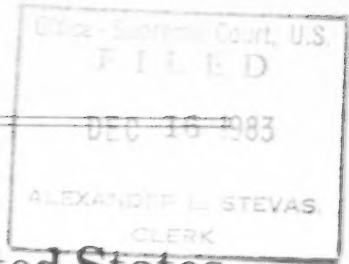
rights to the benefit of government services and opportunity for government service regardless of sexual orientation.

I shall designate a Chairperson and Vice-Chairperson of the Task Force. Its members shall receive no compensation, but shall be entitled to reimbursement for any necessary expenses incurred directly in connection with the performance of their duties.

GIVEN under my hand and the Privy Seal of the State in the City of New York this 18th day of November in the year one thousand nine hundred eighty-three.

/s/ MARIO M. CUOMO

No. 82-1724



IN THE
Supreme Court of the United States

October Term, 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER and SUSAN BUTLER,

Respondents.

ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS.

BRIEF FOR RESPONDENT SUSAN BUTLER

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i.

Question Presented

Does New York Penal Law §240.35 subd. 3 violate established New York case law dealing with loitering statutes, and does it violate the void-for-vagueness doctrine under the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

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Summary of Argument

Consistent with a long line of loitering cases which it previously decided, the New York Court of Appeals struck the statute in question. The language of the Memorandum decision below, when viewed against the impressive weight of New York authority which exists in this area, makes it clear that the Court of Appeals' determination was premised upon the statute's vagueness.¹

Ignoring the New York precedent, Petitioner has focused upon a number of "compelling state interests" which it claims the statute in question was designed to protect. It is respectfully submitted that in taking this approach, Petitioner's presentation of this case is not properly focused.

The focus must be on the wording of the statute itself, not upon the compelling state interests with which Petitioner deals so extensively. If the statute is found to violate the void-for-vagueness doctrine under the Due Process Clause of the Fourteenth Amendment, compelling state interests become irrelevant. No matter how compelling the state interest, it cannot save a statute which is unconstitutionally vague. It becomes a futile effort to consider what the State can or cannot prohibit, if one cannot know from reading the statute what conduct is, and what conduct is not, forbidden.

The State, with no statutory or other legal authority, has interpreted the statute in question as prohibiting, among other things, the "offensive" solicitation of

¹ In light of this strong New York precedent, this Court might well decide to dismiss the writ of certiorari herein as improvidently granted.

"deviate" sex, when, in fact, it is a "loitering" statute which is totally silent about "offensive" solicitation (not to mention the fact that it does not require any solicitation at all). In effect, the State insists upon reading into the statute elements which plainly do not exist, confusing the statute's elements with the proof that may be offered in a given case to establish those elements.

The fatal flaw in Petitioner's argument can be summarized thusly: the State complains about "offensive" conduct and its harmful effect on society, and casually concludes that the statute in question is designed to prevent that "offensive" conduct, all the time ignoring the statute's vagueness.

In an effort to clarify the real issue which exists, Respondent Butler concedes at the outset that the public does have a right to not be exposed to *offensive* solicitations for deviate sex. However, and this is where the battle line is drawn, that right must be protected by a properly drafted statute, unlike the one presently before this Court.

The Court of Appeals' disposition of this case is consistent with the decisions of this Court which have applied the void-for-vagueness doctrine. Other constitutional considerations aside, because the statute's imprecision and failure to provide reasonably clear guidelines create a grave danger of arbitrary enforcement, it must not be allowed to stand.

ARGUMENT

New York Penal Law §240.35 subd. 3 violates established New York case law dealing with loitering statutes, and violates the void-for-vagueness doctrine under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The decision of the Court of Appeals is readily understood if examined in the light of firmly established legal precedent in the State of New York. In *People v. Diaz*, 4 N.Y. 2d 469, 176 N.Y.S. 2d 313, 151 N.E. 2d 871 (1958), the Court of Appeals considered a Dunkirk City Ordinance which provided that "No person shall lounge or loiter about any street or street corner in the City of Dunkirk." Striking the ordinance on vagueness grounds, the court reasoned thusly:

While the term "loiter" or "loitering" has by long usage acquired a common and accepted meaning (*People v. Bell*, 306 N.Y. 110), it does not follow that by itself, and without more, such term is enough to inform a citizen of its criminal implications and, by the same token, leave it open to arbitrary enforcement. *Id.*, at 470.

As a precursor of cases to follow, the court noted that "Whenever a conviction for loitering has been upheld, it is because the statute uses the term 'loiter' or 'loitering' to point up the prohibited act, either actual or threatened." *Id.*, at 471.

The development of New York's case law in this area established that where a statute combined loitering with an ultimate act which the Legislature had a legitimate purpose in prohibiting (such as prostitution in *People v. Smith*, 44 N.Y. 2d 613, 407 N.Y.S. 2d 462, 378 N.E. 2d 1032 (1978), and using narcotic drugs in *People v. Pagnotta*, 25 N. Y. 2d 333, 305 N.Y.S. 2d 484, 253 N.E.

2d 202 (1969)), or where the scope of a statute prohibiting loitering was specifically limited to designated places where loitering, as such, might pose a danger to the public order or to the public safety (such as railroad stations in *People v. Bell*, 306 N.Y. 110, 115 N.E. 2d 821 (1953), the waterfront facility of the Port of New York in *People v. Merolla*, 9 N.Y.2d 62, 211 N.Y.S. 2d 155, 172 N.E.2d 541 (1961) and school buildings in *People v. Johnson*, 6 N.Y. 2d 549, 190 N.Y.S. 2d 694, 161 N.E.2d 9 (1959)), New York has consistently allowed the statute to stand.²

² This position was succinctly set forth in *People v. Berck*, 32 NY2d 567, 570-571, 347 N.Y.S. 2d 33, 300 N.E. 2d 411 (1973), as follows:

The loitering statutes which we have upheld against attack on the ground of vagueness are altogether different from the sort of provision here challenged. (See, e.g., *People v. Pagnotta*, 25 N Y 2d 333, *supra*; *People v. Merolla*, 9 N Y 2d 62; *People v. Johnson*, 6 N Y 2d 549; *People v. Bell*, 306 N. Y. 110.) In each of the cited decisions, the statutes before the court were sustained either because they clearly 'point[ed] up' the prohibited act (e.g., *People v. Diaz*, 4 N Y 2d 469, 471, *supra*; *People v. Pagnotta*, 25 N Y 2d 333, *supra*) or else restricted loitering only at specific facilities where the likelihood of illegal activity was notorious (e.g., *People v. Merolla*, 9 N Y 2d 62, *supra*; *People v. Johnson*, 6 N Y 2d 549, *supra*; *People v. Bell*, 306 N. Y. 110, *supra*). For instance, in *Pagnotta* (25 N Y 2d 333, 338, *supra*), we sustained a provision of the former Penal Law making it illegal to loiter about any 'stairway, staircase, hall, roof, elevator, cellar, courtyard or any passageway of a building for the purpose of unlawfully using or possessing any narcotic drug'. And, in the *Merolla* case (9 N Y 2d 62, 66, *supra*), we held valid a provision of the Waterfront Commission Act which forbade loitering 'upon any vessel, dock, wharf, pier, bulkhead, terminal, warehouse, or other waterfront facility'. The statute involved in *Merolla* (9 N Y 2d, at pp. 66-68), we observed in that case, dealt with loitering at 'specific facilities' which were notorious for 'the evils which * * * pervaded the area'. Quite obviously, such specificity of the prohibited conduct is totally lacking in the statute before us.

It is against this impressive weight of authority that the Court of Appeals, citing its decision in *People v. Onofre*, 51 N.Y. 2d 476, 434 N.Y.S. 2d 947, 415 N.E. 2d 936 (1980), cert. den. 451 U.S. 987, 68 L. Ed. 2d 845, 101 S.Ct. 2323 (1981), held below that:

"... The object of the loitering statute is to punish conduct anticipatory to the act of consensual sodomy. Inasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose." *People v. Uplinger and Butler*, 58 N.Y. 2d 936, 938, 460 N.Y.S. 2d 514, 447 N.E. 2d 62 (1983).

This was a tacit recognition by the Court of Appeals that, as originally drafted, the section in question was designed to punish inchoate activity leading up to what was then a crime under section 130.38 of the New York Penal Law (i.e., consensual sodomy). Since, in the wake of *People v. Onofre*, *supra*, consensual sodomy was no longer criminal, merely loitering for that legal purpose, without more, could no longer be condemned.

With specific reference to the second aspect of New York's loitering precedent—i.e., where loitering can be prohibited in specific places to protect public order or safety—the Court of Appeals stated:

"... We do not hold that the Legislature cannot enact a law prohibiting a person from accosting another in an offensive manner or in an inappropriate place even if the underlying purpose is not a violation of law. The Legislature could also prohibit solicitation for the purpose of performing the object conduct in a public place. On the contrary, statutes of this general nature when properly drafted have been upheld by the courts." *People v. Uplinger and Butler*, *supra*, at 938 (emphasis supplied).

It is clear from the quoted language that the Court of Appeals struck down the instant loitering statute on vagueness grounds construed under principles of State law. This conclusion is reinforced by other passages of the Court of Appeals' decision, to wit:

"...Because the statute itself is devoid of a requirement that the conduct proscribed be in any way offensive or annoying to others, the challenged statute cannot be categorized as a harassment statute.

* * *

However, it is apparent from the wording of this statute that it was aimed at proscribing overtures, not necessarily bothersome to the recipient, leading to what was, at the time the law was enacted, an illegal act." People v. Uplinger and Butler, supra, at 938 (emphasis supplied).

This finding of vagueness by New York's Court of Appeals under principles of State law is in total accord with the decisions of this Court. In a recent decision which struck down a California loitering statute, Justice O'CONNOR summarized the void-for-vagueness doctrine thusly:

"...As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Village of Hoffman Estates v. Flipside, 455 US 489, 71 L Ed 2d 362, 102 S Ct 1186 (1982); Smith v. Goguen, 415 US 566, 39 L Ed 2d 605, 94 S Ct 1242 (1974); Grayned v. City of Rockford, 408 US 104, 33 L Ed 2d 222, 92 S Ct 2294 (1972); Papachristou v. City of Jacksonville, 405 US 156, 31 L Ed 2d 110, 92 S Ct

839 (1972); *Connally v. General Construction Co.*, 269 US 385, 70 L Ed 322, 46 S Ct 126 (1926). Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.' *Smith*, *supra*, at 574, 39 L Ed 2d 605, 94 S Ct 1242. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' *Id.*, at 575, 39 L Ed 2d 605, 94 S Ct 1242 (footnote reference deleted)." *Kolender v. Lawson*, _____ U.S. _____, 75 L. Ed. 2d 903, 909, 103 S. Ct. 1855 (1983).

Significantly, as this passage clearly demonstrates, the potential for arbitrary enforcement is the primary concern in this area.

With these principles in mind, attention is now directed to the statute itself, which provides that an individual is guilty of loitering when he "Loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature; . . ." New York Penal Law, §240.35 subd. 3.

Initially, attention will be paid to that portion of the statute which refers to "other sexual behavior of a deviate nature." Petitioner candidly admits that that phrase is not statutorily defined, but then claims that by "common usage" it is understood "as sexual conduct 'characterized by or given to significant departure from the behavioral norms' of society", citing *Webster's Dictionary* as authority for its position.³ Unfortunately,

³ Brief for Petitioner 11.

far from providing a precise guideline, Webster's definition is itself unacceptably vague. Thus, what kind of sexual conduct represents a "significant departure from the behavioral norms" of society? The answer to this query would undoubtedly vary from police officer to police officer and is the very evil upon which the vagueness doctrine focuses.⁴

In addition, the State, without any statutory authority or legislative history to support its position, maintains that the phrase "other sexual behavior of a deviate nature" "... includes acts of bestiality and necrophilia (see Penal Law §130.20 subd. 3), acts involving the insertion of a foreign object into the vagina, urethra, penis or rectum (see Penal Law §130.70), acts of sexual sadism or masochism (see Penal Law §§120.00, 120.05 and 120.10 dealing with assault; see also Penal Law Article 130 specifically as it deals with offenses against those who are unable to consent due to age or mental deficiency), all unquestionably 'deviate' by any definition."⁵ New York courts have never construed the phrase "other sexual behavior of a deviate nature" the way Petitioner does. However, assuming *arguendo* that the phrase in question does include the conduct referred to by Petitioner, that fact, far from overcoming the statute's vagueness, only serves to emphasize it. Hence, while "other sexual behavior of a deviate nature" *might* include bestiality, necrophilia, etc., that is not to say

⁴ See *Smith v. Goguen*, 415 U. S. 566, 575, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974), where this Court, referring to Mr. Justice BLACK'S concurring opinion in *Gregory v. City of Chicago*, 394 U. S. 111, 120, 22 L. Ed. 2d 134, 89 S. Ct. 946 (1969), expressly shared his concern "against entrusting lawmaking 'to the moment-to-moment judgment of the policeman on his beat.' "

⁵ Brief for Petitioner 11.

that the phrase, by definition, is *specifically limited* to those acts. Conceptually, when analyzing vagueness, this is an important distinction: while certain conduct *may be included* in a phrase, that does not mean that the phrase in question is definitionally limited to that conduct. Because it is not so precisely restricted, this is where the vagueness becomes manifest.

By way of example, assume that a police officer happens upon an unmarried couple in a public place and observes the man's mouth on the female's breast. While a seasoned veteran might think nothing of this, and merely tell the couple to move along, a "rookie" who just left the seminary might find such conduct between an unmarried couple "deviate" and arrest them. Moreover, while a police officer might not consider such conduct "deviate" between an unmarried, heterosexual couple, he might consider it "deviate" if engaged in by a homosexual couple.⁶

Totally unclear, in light of New York's statutory scheme, is whether a married couple could ever engage with one another in "other sexual behavior of a deviate nature," and thereby run the risk of violating the loitering statute. By definition, a married couple cannot engage in "deviate sexual intercourse."⁷ But let us assume that their conduct does not involve mouth to

⁶ These examples conclusively demonstrate why this Court has insisted upon "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith v. Goguen, supra*, at 574.

⁷ New York Penal Law §130.00, subd. 2 provides the following definition:

"Deviate sexual intercourse" means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva.

penis, penis to anus, or mouth to vulva contact. Assume, using the State's example, that it involves "the insertion of a foreign object into the vagina, urethra, penis or rectum (see Penal Law §130.70)". Even accepting Petitioner's contention that such conduct is "unquestionably 'deviate' by any definition",⁸ is it "deviate" for a married couple? Since their married status exempts them from the classification of "deviate sexual intercourse," does it not also exempt them from "other sexual behavior of a deviate nature"? No answer exists to this question, not in New York's statutory scheme nor in its case law. Clearly, the very imprecision of the phrase, "other sexual behavior of a deviate nature," places "unfettered discretion" in the hands of the police officers who must enforce it, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972), and is, therefore, unconstitutionally vague.

Excising this objectionable portion, the statute is reduced to condemning a person who "loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse...." Of course, as noted by the Court of Appeals, on the heels of *People v. Onofre*, *supra*, the statute proscribes loitering for the purpose of engaging in or soliciting what is now in New York a lawful act. For that reason alone, when viewed against the weight of authority in New York, the statute must fall.⁹

⁸ Brief for Petitioner 11.

⁹ See pages 3-6, *supra*. Of particular relevance in light of *Onofre* is the language, quoted above, from *People v. Diaz*, *supra*, at 471: "Whenever a conviction for loitering has been upheld, it is because the statute uses the term 'loiter' or 'loitering' to point up the prohibited act, either actual or threatened." (Emphasis supplied.)

However, further analysis will serve to demonstrate, conclusively, the statute's constitutional deficiencies. The State's concerns about the public order, about offensive solicitations made to unreceptive solicitees, and about "undeniably lewd" speech "forced upon another in a public place" notwithstanding, this conduct that the State objects to is not even referred to under the statute's proscriptions. The State, as did the lone dissenter at the Court of Appeals, persists in confusing the elements of the crime with conduct which might be used in a given case to establish those elements.

Solicitation, discreet or otherwise, "lewd" or otherwise, is not what this loitering statute bans. This statute bans loitering in any public place in the State with the thought (however fleeting) of engaging in, or asking another to engage in, deviate sexual activity. The statute requires no conduct other than that (*i.e.*, mere thought) for the State to arrest, charge, and incarcerate an individual.¹⁰

However, even if the statute specifically required that actual words be spoken to another, the vagueness problem is not cured.¹¹

¹⁰ In striking down an almost identical statute, the Colorado Supreme Court, ruling that the statute did not satisfy constitutional due process requirements, reasoned thusly: "The statute fails to require the loitering to be coupled with any other overt conduct. Rather, the loitering need only be coupled with the state of mind of having 'the purpose of engaging or soliciting another person to engage in . . . deviate sexual intercourse.'" *People v. Gibson*, 184 Col. 444, 521 P. 2d 774, 775.

¹¹ Respondent Butler does not concede that the wording of the statute requires that actual words be spoken (*i.e.*, that a "solicitation" occurs). However, even giving the State the benefit of reading into the statute what it does not, on its face, prohibit (*i.e.*, "offensive" solicitation), the statute would still be unconstitutionally vague.

If it is the State's contention that all solicitations for deviate sex are *per se* offensive, that position is untenable. While such solicitations might be offensive to some, they are clearly not offensive to all. In an Opinion striking down a Cincinnati, Ohio, ordinance which made it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . .", Mr. Justice STEWART specifically addressed this issue:

"Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.' *Connally v. General Construction Co.*, 269 U.S. 385, 391, 70 L.Ed. 322, 328, 46 S. Ct. 126." *Coates v. Cincinnati*, 402 U.S. 611, 614, 29 L.Ed. 2d 214, 91 S. Ct. 1686 (1971).

Ironically, the Cincinnati statute at least used the words "in a manner annoying to persons passing by. . .", while the New York statute is absolutely silent in this respect.

The statute leaves many questions about enforcement unanswered. Thus, can only the person solicited complain, or can anyone who hears the solicitation complain? (Petitioner apparently is of the view that it applies to both in referring to the "unwilling solicitee and the unwilling bystander."¹²) What if the solicitation is not offensive to the solicitee but is offensive to the bystander; can the bystander still complain? What if the solicitation is offensive to neither the solicitee nor the bystander, can the patrolman on his beat nevertheless make an arrest? In other words, upon whose sensitivity does a violation depend? *Coates v. Cincinnati*, *supra*; cf.

¹² Brief for Petitioner 8.

Chaplinsky v. New Hampshire, 315 U. S. 568, 86 L. Ed. 1031, 62 S. Ct. 766.

Using the State's phrase, does the solicitation have to be "undeniably lewd",¹³ or is it enough if it gets the point across without employing offensive language? Stated otherwise, is the focus on the actual language used, or on the mere fact that a solicitation, however harmless, has occurred? The statute sheds no light whatsoever on these questions.

Furthermore, if, as the State would urge, the focus is on offensive solicitation,¹⁴ what would the criminal

¹³ *Ibid.* Again, the State insists upon reading into the statute an element which does not exist. The statute makes no mention of "lewd" solicitations. And to the extent that mere solicitations (not necessarily lewd or offensive) are outlawed, there are First Amendment implications which bear on the vagueness issue. "... perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply (footnote reference deleted)." *Village of Hoffman Estates v. Flipside*, 455 U. S. 489, 499, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982).

¹⁴ For all the State's concern about offensive solicitations and the necessity of having this statute to protect the public from being subjected to them, the statute, ironically, would not punish a male who approaches a female stranger in a public place and, in the presence and hearing of twenty people, says to her, "Do you want to f---?" On the other hand, the statute, to the State's apparent satisfaction, would punish a male who discreetly asks his female friend in a public place if she would like to go to his apartment and engage in oral sex. If the State is of the opinion that New York has statutes which punish the former (see Brief for Petitioner, 27-28), then New York certainly does not need this statute to punish the latter (assuming, only for the sake of argument, that the latter conduct is not otherwise constitutionally protected). It is clear from Petitioner's emphasis on "offensive" solicitations that the State is concerned about the manner in which such solicitations are made; yet, the statute is conspicuously silent about the nature of the solicitation, a fact expressly referred to by the Court of Appeals in reaching its decision.

liability be in this situation? M (a male) and F (his female friend), having spent an intimate night together at F's apartment where they engaged in "deviate sexual intercourse", plan to meet at noon the next day in the park. M arrives first and wanders about (i.e., "loiters") while waiting for F, preoccupied with thoughts of the events of the previous evening. When F arrives, M says, "You were fantastic last night. Shall we go to my place and pick up where we left off?" Overhearing this, a police officer decides to follow, peers in the window of M's apartment, and sees them engaging in "deviate sexual intercourse." A literal reading of the statute indicates that M is subject to arrest because he loitered in a public place (the park) for the purpose of soliciting F to engage in "deviate sexual intercourse." But is this really the type of conduct which the Legislature intended to reach by this statute? The "solicitation" was totally innocuous, it was not "undeniably lewd", and the ultimate act took place in private, yet under the wording of the statute, M's remark in the park is criminal.¹⁵

As the above example illustrates, the statute, contrary to the State's view, is not limited in scope to acts which occur in public. If the solicitation, however innocuous, occurs in public and the sexual act in private, criminal charges can be brought.

It is Petitioner's position "that the object of the statute under consideration is regulation of behavior occurring in a public place."¹⁶ However, this again demonstrates how the State chooses to ignore the precise wording of the statute. The statute forbids loitering or

¹⁵ This calls to mind Mr. Justice DOUGLAS' comment in *Papachristou, supra*, at 163, concerning the Jacksonville ordinance: "[It] makes criminal activities which by modern standards are normally innocent."

¹⁶ Brief for Petitioner 16.

remaining in a public place; but, it does not limit its application to the solicitation of, or actual engagement in, deviate sex in a public place. Thus, if a male loiters in a public place and invites a female back to his house with the specific purpose of asking her, when they get there, to engage in deviate sex, he has violated the statute. Contrary to Petitioner's view, the wording of the statute does not require that either the solicitation or the ultimate sex act occur in a public place. The Court of Appeals recognized this¹⁷; that Petitioner does not only serves to emphasize the statute's vagueness.

Even if the statute is construed to mean that it applies to deviate sexual intercourse engaged in in public places, it would still suffer from vagueness. Given the focus of the State's expressed concern (i.e., conduct offensive to others), does the statute proscribe the following? Assume that A and B, an unmarried, heterosexual couple, go camping in a state park. They purposely seek out a remote spot thereof (a cave), and, enjoying the romantic intimacy of the moment, engage in deviate sex. Much to their chagrin and total embarrassment, a forest ranger on patrol discovers them. Undeniably, under the statute in question, they are guilty of loitering. But can it seriously be contended that the State has a compelling interest in prohibiting such conduct under these circumstances? (Not one of the compelling state interests cited by Petitioner has any application here.) The problem is that the statute merely provides a blanket proscription of all loitering or remaining in public, without in any way attempting to limit the words "in

¹⁷ "The Legislature could also prohibit solicitation for the purpose of performing the object conduct in a public place." *People v. Uplinger and Butler*, *supra* (emphasis supplied).

public". Again, the Court of Appeals was aware of this problem.¹⁸

The statute is problematic in another respect, which was briefly discussed above. As worded, it describes an inchoate offense and consequently punishes mere thought. Thus, if a person loiters or remains in a public place with the express intention of engaging in or soliciting another to engage in "deviate sexual intercourse", he has committed the crime regardless of whether he ever actually engages in, or solicits another to engage in, "deviate sexual intercourse." That the thought entered his mind is enough to convict; that thought need not materialize into action (i.e., the actual solicitation of, or engaging in, deviate sexual intercourse).¹⁹ Appropriate, in this context, are the words of Mr. Justice Douglas, concurring in *Speiser v. Randall*, 357 U.S. 513, 536, 2 L. Ed. 2d 1460, 1479, 78 S. Ct. 1332 (1958): "What a man thinks is of no concern to government. 'The First Amendment gives freedom of mind the same security as freedom of conscience.'

¹⁸ "We do not hold that the Legislature cannot enact a law prohibiting a person from accosting another in an offensive manner or in an inappropriate place even if the underlying purpose is not a violation of law." *People v. Uplinger and Butler*, *supra* (emphasis supplied). This Court has recognized that privacy interests do exist in public places and that such interests vary in intensity depending upon the nature of the public place involved: "... it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park. ..." *Cohen v. California*, 403 U. S. 15, 21, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971). Finally, to whatever extent this example is construed to be an overbreadth argument (which doctrine was expressly rejected by the New York Court of Appeals as a basis for its holding), reference need only be made to Justice O'CONNOR'S statement in *Kolender v. Lawson*, *supra*, at 910, n. 8: "But we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines."

¹⁹ See *People v. Gibson*, *supra*, cited herein at p. 11, n. 10.

Thomas v. Collins, 323 U.S. 516, 531, 89 L.Ed. 430, 440, 65 S. Ct. 315."

The real danger of the statute lies in its use against only those individuals who are deemed "undesirable" by society: for example, against suspected prostitutes and suspected homosexuals. They, in effect, become "marked" individuals who are easy prey to the vagaries of the statute and its arbitrary enforcement by the police. Thus, a "known" prostitute, or a "known" homosexual, regardless of their innocent and lawful "loitering", can easily become the targets of discriminatory enforcement under such an imprecise statute. Because of their respective reputations, a casual conversation can be construed as an illegal solicitation and lead to an arrest.²⁹

That arbitrary enforcement does occur was graphically exposed when Judge Drury posed the following hypothetical in Buffalo City Court:

"... Let's say your officers or some officer found a couple in a park and there's no evidence of prostitution, they wouldn't be arrested, would they, male and female? They never have, have they?"

²⁹ In effect, the statute permits punishment based upon status. This fact, coupled with Respondent Butler's earlier claim that the statute punishes mere thought, brings to mind the comments of Mr. Justice BLACK who, in a concurring opinion in *Powell v. Texas*, 392 U. S. 514, 543, 20 L. Ed. 2d 1254, 88 S. Ct. 2145 (1968), commented thusly upon this subject:

"Punishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense; the mental element is not simply one part of the crime but may constitute all of it. This is a situation universally sought to be avoided in our criminal law; the fundamental requirement that some action be proved is solidly established even for offenses most heavily based on propensity, such as attempt, conspiracy, and recidivist crimes (footnote reference deleted)".

In reply, Captain Kenneth Kennedy, the officer in charge of the Buffalo Police Department's Bureau of Vice Investigation, gave this telling answer:

"Depending on the circumstances generally—well, not if it would indicate that there were no involvement in prostitution but if they're in the area where there's prostitutes, where there's homosexuals or where we have complaints of people being disturbed and of these acts being committed where people can see them. . . ." Joint Appendix 8.

His message was clear: if you are not a prostitute or a homosexual, you will not be prosecuted under the statute.

Needless to say, the potential for arbitrary enforcement is astounding. One can envision a scenario where police roam about "Lovers' Lanes" shining their flashlights into the windows of cars parked there; and, depending not only upon *what* they observe, but, perhaps more importantly, upon *whom* they observe, make arrests under this statute. Because of the statute's imprecise terms, it "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Papachristou v. City of Jacksonville, supra*, at 170 (quoting from *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 84 L. Ed. 1093, 1100, 60 S. Ct. 736). "Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections." *Smith v. Goguen, supra*, at 575.

The imprecision and utter vagueness of this statute becomes manifest when it is compared to §240.37 of the New York Penal Law, entitled "Loitering for the purpose

of engaging in a prostitution offense."²¹ In upholding the validity of §240.37, the New York Court of Appeals, rejecting a claim of unconstitutionality premised upon vagueness, reasoned thusly:

"The strength of defendant's assault on section 240.37 is diminished greatly by the presence therein of an element lacking in those enactments struck down and declared void for vagueness... That distinctive characteristic is the delineation of *specific* conduct, in addition to the loitering, which the arresting officer must observe. Thus, the statute explicitly limits its reach to loitering of a demonstrably harmful sort, *i.e.*, loitering for the purpose of committing a specific offense." *People v. Smith*, 44 NY 2d 613, 620, 407 N.Y.S. 2d 462, 378 N.E. 2d 1032 (1978) (emphasis supplied).

²¹ That statute provides as follows:

1. For the purposes of this section, "public place" means any street, sidewalk, bridge, alley or alleyway, plaza, park, driveway, parking lot or transportation facility or the doorways and entrance ways to any building which fronts on any of the aforesaid places, or a motor vehicle in or on any such place.

2. Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of prostitution, or of patronizing a prostitute as those terms are defined in article two hundred thirty of the penal law, shall be guilty of a violation and is guilty of a class B misdemeanor if such person has previously been convicted of a violation of this section or of sections 230.00 or 230.05 of the penal law.

3. Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of promoting prostitution as defined in article two hundred thirty of the penal law is guilty of a class A misdemeanor.

Obviously, the Court of Appeals could not say the same about the statute presently under scrutiny. Contrary to what the State insists upon reading into it, the statute delineates *no* "specific conduct, in addition to the loitering, which the arresting officer must observe." *Id.* Furthermore, as can be seen by the several examples previously alluded to, it cannot be said, as in *People v. Smith, supra*, that the instant statute "explicitly limits its reach to loitering of a demonstrably harmful sort

.....

Petitioner, on several occasions in its brief, refers to the compelling state interest of regulating prostitution.²² That such a state interest exists is not disputed; however, what is particularly disturbing about the State's position in this regard is that New York has legislation which is specifically directed at loitering for the purpose of prostitution (i.e., §240.37). The police officer made a conscious choice not to arrest Respondent Butler under that section, although he testified that he could have done so.²³ Instead, he arrested her under the instant statute, admitting that he knew about the *Onofre* decision.²⁴ In light of the officer's failure to arrest Respondent Butler under a statute specifically designed to prohibit loitering for the purpose of prostitution, a statute whose constitutionality had been upheld by the New York Court of Appeals,²⁵ Petitioner should not be heard to complain in this case about the State's compelling interest in regulating prostitution.

The following passage from the State's brief suggests its true purpose in seeking to have the instant statute upheld:

²² Brief for Petitioner 9, 19, and especially 21, 24.

²³ Joint Appendix 2.

²⁴ *Ibid.*

²⁵ *People v. Smith, supra*.

"Although concededly there are other laws permitting the prosecution of deviate prostitution, it is submitted that such laws do not easily succumb to enforcement due to the problem of proving payment absent solicitation of an undercover police officer." Brief for Petitioner 19.

What the State apparently desires are two statutes to police the same conduct, one suitably vague (*i.e.*, §240.35 subd. 3) which can be used to avoid the proof requirements of the other (*i.e.*, §240.37). Suffice it to say, the arsenal of the police must not be increased with legislation of this ilk.²⁸

²⁸ Summary treatment will be accorded to the State's contention that Respondent Butler lacks standing to attack the statute on vagueness grounds. In the first place, Petitioner never questioned her standing before the New York Court of Appeals. Not having done so, the State should not be heard to complain about her standing at this stage of the proceedings.

Furthermore, contrary to the State's position in this regard, the record below does not establish that Respondent Butler's conduct "is clearly embraced within the statute." Brief for Petitioner 33. Because, by its terms, the statute punishes mere thought, who can say, absent any proof of the content of her alleged solicitation (Joint Appendix 4), what Respondent Butler was thinking while waiving at passing cars? For all that the record establishes, she might have been loitering "for the purpose of" soliciting conventional sexual intercourse, only to later give in to her partner's stated preference for "deviate" sexual activity. Thus, while her conduct clearly fell within the ambit of Penal Law §240.37 and thereby satisfied the notice requirement demanded by due process with respect to that statute, the same cannot be said regarding Penal Law §240.35 subd. 3, precisely because of that statute's facial vagueness.

Finally, for all of the State's concern about "lewd" solicitations which offend the public's sensibilities, the record contains no proof whatsoever that Respondent Butler was soliciting in a lewd manner or that her conduct offended anyone. Indeed, the accusatory instrument did not charge her with either "lewd" or "offensive" solicitation, alleging merely that she "did loiter and remain in a public place ... for the purpose of engaging, soliciting another person to engage in deviate sexual intercourse, in that the defendant Butler did loiter ... waiving to cars ... The defendant Butler did approach the [other] defendant[s] ... car had a conversation and entered car...." See Original Record.

As mentioned at the outset, the compelling state interests relied upon by the Petitioner cannot overcome the due process vagueness which infects this statute. To be sure, many of the problems which the State envisions in this area are real. It is up to the State's Legislature, however, to take up the Court of Appeals' invitation and draft legislation which deals with these problems in constitutionally acceptable language.

If it is the Petitioner's lament that a useful law enforcement tool will have been lost, the words recently spoken by this Court could not be more appropriate:

"... The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government. As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity." *Kolender v. Lawson*, *supra*, at 911.

CONCLUSION

Under applicable New York Law and the principles of Due Process embodied in the Fourteenth Amendment of the United States Constitution, the judgment of the New York State Court of Appeals should be affirmed.

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NO. 82-1724

In The
Supreme Court of the United States
OCTOBER TERM, 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER AND SUSAN BUTLER,

Respondents.

ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

MOTION FOR DIVIDED ARGUMENT

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Pursuant to Rules 38.4 and 42 of the Rules of this Court, Counsel for Respondent Susan Butler hereby moves this Honorable Court for permission to present oral argument in the above-captioned matter.

The state has focused its attention in this case on what it perceives as compelling state interests which, it claims, are vindicated by the statute before this Court. Stressing the right of its citizens to walk the streets free of solicitations for "deviate" sex, the state apparently takes the position that all such solicitations are offensive per se.

From the course which this case has followed through the courts of New York State, it is believed that Respondent Uplinger will focus upon a number of constitutional rights which the statute violates (i.e., freedom of speech and association, the right to privacy, and equal protection). In this vein, Respondent Uplinger will likely argue that it is an individual's constitutional right to discreetly solicit, in public, what New York describes as "deviate sexual intercourse" (New York State Penal Law §130.00 subd. 2).

In one very important aspect, it may well be that Respondent Butler's position will differ significantly from Appellant's and from Respondent Uplinger's. While their respective positions will likely pit compelling state

interests against individual rights, Respondent Butler contends that these considerations are of secondary importance to the central issue--i.e., that the statute is unconstitutionally vague on its face.

Respondent Butler's void-for-vagueness claim will be argued not only in light of the precedent established in this Court, but also on the basis of the decision rendered below by New York's Court of Appeals, as viewed against New York's firmly established legal precedent with respect to loitering statutes. (In light of the New York precedent in this area, this Court may well decide that adequate state grounds exist to support the Court of Appeals' decision, and dismiss the writ of certiorari herein as improvidently granted.)

If the statute is unconstitutionally vague, the showdown between compelling state interests and individual rights will have to await another day in court. Those competing interests can only be reckoned with if they clash under a properly drafted statute--one that does not suffer from vagueness--unlike the one presently before this Court.

Divided argument, it is respectfully submitted, will be helpful to the Court in exploring this alternative position presented on behalf of Respondent Butler.

William H. Gardner, Counsel for Respondent Uplinger, has indicated that he will not oppose this motion, and has

also indicated his willingness to allow Counsel for Respondent Butler ten minutes of the thirty minutes allotted for oral argument. Counsel for Respondent Butler is of the opinion that ten minutes provides adequate time to present his position.

WHEREFORE, this Court is respectfully requested to grant Respondent Butler's motion for divided argument in accordance with the time allotments specified herein.

Respectfully submitted,

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No. 82-1724

In The
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER and SUSAN BUTLER,

Respondents.

**ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS**

REPLY BRIEF FOR PETITIONER

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The following is submitted in response to certain of the arguments made on behalf of those maintaining positions contrary to that of the Petitioner. The points discussed, although dealing with distinct issues not covered in Petitioner's main brief, generally affirm the earlier presented contention that the statute under litigation has as its legitimate object the penalization of offensive conduct as opposed to punishment based upon status or sexual preference.

I

The statute is not overbroad as applied to Uplinger and others who engage in conduct identical to his.

Conceding that "indiscreet, overt and obtrusive"¹ public solicitations to engage in private sexual acts are subject to a constitutional proscription, Respondent Uplinger challenges the reach of §240.35 subd. 3 specifically as applied to his

¹Uplinger Brief 26

conduct and the conduct of others acting in an identical manner. He suggests that solicitations including his to Officer Nicosia, which are "not lewd"² and are uttered "discreetly and politely,"³ cannot be considered valid targets of the loitering provision. Uplinger asserts that relative to the matters at bar: "The State argues a case not before the Court. Indiscriminate sexual solicitation did not occur; none of the other argued offensive factual concerns were present."⁴

Firstly, no intentional avoidance of the legal realities of the present case can alter the fact that Susan Butler is a party/respondent to the present litigation. Her desultory, random solicitations directed at vehicles on a public street have been directly and unequivocally characterized as "indiscriminate" without challenge even by Respondent Butler. Nor is there any dispute that much of the testimony at the hearing held before Judge Drury in Buffalo City Court dealt largely with public solicitations by prostitutes to random members of the community. The significant incidence of prostitution in the present case works only to underscore the statute's asserted legitimacy.⁵

With respect to Mr. Uplinger's conduct, it cannot be said that it fits even within the niche he himself has carved out as beyond the statute's legitimate reach. As the record demonstrates, the defendant after introducing himself to undercover officer Nicosia, asked if the officer wanted "to get high."

²Id., at 6

³Id., at 28

⁴Id., at 25

⁵That prostitution is a prominent aspect of the pending litigation is evidenced not only by prostitute Susan Butler's imposing presence, but also by the fact that a second prostitute, Fredericka Sanders, whose case was joined with that of Uplinger and who, in fact, was represented by Uplinger's attorney, was originally a party in the appeals herein. Pet. for Cert. App. C 1c and 3c. Therefore, it is most difficult to accept the sincerity of Uplinger's statement that "the statute's provisions are virtually unenforceable except as against homosexuals. . ." Uplinger Brief 34.

When Nicosia refused this offer, an exchange, initiated by Uplinger, began with each individual asking the other, "What do you like to do?" The two were joined by three or four other males whom Uplinger introduced to Nicosia on the steps of the premises at 140 North Street where they had all congregated. When a police vehicle approached and all were ordered off the steps, the group dispersed, each person walking in a separate direction.

Mr. Uplinger chose to follow Nicosia to ask if Nicosia "Wanted to go to his [Uplinger's] place." Upon Nicosia's inquiry as to what it was that Uplinger wanted, Uplinger responded to the effect, "Well, do you just want to come over." Nicosia, delivering his second refusal of the brief conversation, answered, "[N]o I'm scared with the police and I want to leave — I'm going to leave." To this Uplinger replied, "[W]ell if you drive me over to my place or go over to my place I'll blow you." (Joint App. 103-105)

For Respondent Uplinger to suggest that the above solicitation is "discreet and polite" is truly to exhibit that his perspective lacks any and all objectivity. His banal, vulgar solicitation was delivered to an individual he had never seen before after an encounter of only ten or fifteen minutes. Not only was there no indication of receptiveness on the part of Nicosia, but, in fact, the officer had twice rejected Uplinger's offers and had walked away unaccompanied. Uplinger pursued Nicosia in a real sense, not accepting the officer's refusals nor honoring his attempt to separate himself from Uplinger and the other males in the area. Moreover, Mr. Uplinger is presently barred from contending that the words of his offer to fellate Officer Nicosia were not lewd, since at the trial of his case he entered into a binding legal stipulation that the words "I'll blow you" indicate a proposition to engage in oral sex as understood by "lascivious"⁶ adult males in the United States. (Joint App. 82)

⁶Webster's Third New International Dictionary of the English Language, Unabridged, 14th ed. (1961) lists "lewd" and "lustful" as synonymous cross-references having the same meaning as the word "lascivious."

There exists only one conceivable overly broad application of the statute in question. Such application would involve the arrest of one loitering in a deserted public place who in a discreet manner solicits another to engage in deviate sexual activity knowing that such solicitee is not a minor and is receptive to such a solicitation. Realistically such a situation if it ever exists, exists only in the most insignificant number of cases.

The record in Mr. Uplinger's case is devoid of any evidence that he lingered in the North Street area for any purpose other than satisfying his "lascivious" desires. The record is also absent an indication that there was no one else in the area who might have heard Mr. Uplinger's offer to engage in oral sodomy. What is established by the testimony is that Mr. Uplinger indiscreetly and lewdly solicited a person he barely knew who was clearly not receptive to the proposal.

Further, there is no indication in the present record that there exists any non-imaginary solicitor whose conduct would fall within that most narrow exception to the loitering statute. Respondent Uplinger has failed to establish that his or any other individual's conduct has been improperly restricted. This failure serves well to establish that there is not a "substantial" overreach to New York Penal Law §240.35 subd. 3 rendering the statute constitutionally overboard. *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed. 2d 830 (1973).

II

Respondents have failed to establish that the statute is unconstitutional on its face or as applied to them.

Under an Orwellian spectre, Respondents urge that the vagueness of the statute renders it amenable to arbitrary and discriminatory enforcement, punishes individuals solely based upon their status, infringes upon their freedom of thought and

fails to give adequate notice of the conduct proscribed. Similar arguments are echoed in the briefs of *amici*. All of these claims misperceive the thrust of the statute at issue and offer but shrill and hollow warnings of unchecked police intrusion upon personal liberties.

The statute clearly defines a course of conduct which is deemed criminal. The public is on notice as to what is proscribed and, more importantly, no unwarranted discretion is left in the hands of law enforcement officers. *Kolender v. Lawson*, ____ U.S. ____, 103 S.Ct. 1855, 1858, 75 L. Ed. 2d 903, 909 (1983).

Fears of the Respondents that the present statute provides for arbitrary enforcement by police and prosecutors are unfounded. The statute does not permit the arrest of an individual who is merely standing on a corner giving no indication of an illegal purpose. One alone with his thoughts on a public street would not be subject to charge, for constitutional due process requirements would prohibit such action. Arrest must be based upon probable cause, dependent upon *prima facie* proof that the elements of a crime are present. One's purpose, as such is a necessary element of the loitering law, must be demonstrated by perceivable, overt conduct prior to any arrest.

With respect to Respondent Butler, her mental state, i.e. her purpose, was demonstrated by her waving at cars randomly on a public street, immediately followed by her commission of a public act of sodomy. In the case of Respondent Uplinger, purpose was demonstrated by a clear and direct proposition to engage in an act of sodomy with Officer Nicosia.

As an additional safeguard, conviction is dependent upon proof beyond a reasonable doubt. This yet higher standard requires that articulable evidence as to mental state convince the trier of fact that there is no reasonable possibility that the accused did not commit the charged offense.

The statute at issue does not punish mere thought as Respondents suggest, but rather it punishes conduct, i.e. loitering, carried out for a statutorily proscribed objective. The criminal law is replete with other examples of offenses which are predicated upon⁷ or escalated by⁸ the particular intent of the actor.

In addition to suggesting that the statute could be arbitrarily enforced against mere thought, Respondents also aver that the statute can be improperly enforced based upon status alone. Respondent Uplinger contends that the statute is virtually unenforceable except as against homosexuals, while Respondent Butler, disagreeing, asserts that the statute targets not only homosexuals, but prostitutes as well. Contrary to the contentions of both, the statute in clear language focuses upon conduct and activity without reference to status or classification. The proscriptions relate not to sexual preferences nor to criminal status or reputation but rather to the legislatively perceived general offensiveness felt by those in the community who are indiscriminately solicited. The distinction is analogous to that made by this Court in *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L. Ed. 2d 1254 (1968), a case dealing with a public drunkenness statute:

⁷In New York, for example, the possession of a rifle is not *per se* illegal, but possession with intent to use that weapon unlawfully against another is deemed criminal. Penal Law §265.01 subd. 2. Similarly, the mere possession of obscene materials is not unlawful, but possession with intent to promote is proscribed. Penal Law §235.05 subd. 1.

⁸An actor's "intent to commit a crime" upon a premises elevates a trespass, Penal Law §140.10, to a burglary, Penal Law §140.20. Similarly, the possession of various controlled substances is deemed criminal, Penal Law §220.09, but is punished at a higher level where there exists an intent to sell, Penal Law §220.16.

"The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community. This seems a far cry from convicting one for being an addict, being a chronic alcoholic, being 'mentally ill, or a leper. . .'" 392 U.S. at 532, 88 S. Ct. at 2154, 20 L. Ed. 2d at 1267.

In the course of her vagueness attack, Respondent Butler argues that there is sufficient legal machinery to combat street prostitution without the instant loitering statute. She identifies New York Penal Law §240.37 as a proper vehicle for such control.

Despite the existence of Penal Law §240.37, the loitering section is a legitimate, albeit distinct, tool for the regulation of commercial prostitution activity. While not requiring proof of repeated solicitation or evidence relative to payment, both of which are necessary for conviction under §240.37, the loitering statute accordingly imposes upon prostitutes convicted thereunder a less severe maximum penalty.⁹ The statute properly recognizes the difficulties in proving monetary exchange as well as the general offensiveness of public solicitations, prostitution related or otherwise.

The obvious intent of the loitering statute is to punish conduct deemed offensive to individuals as well as to the

⁹An individual convicted of Penal Law §240.35 subd. 3 is guilty of a violation punishable by a maximum period of incarceration of fifteen days. An individual convicted of Penal Law §240.37, if previously convicted of the same offense or a prostitution related offense, is guilty of a Class B misdemeanor punishable by a maximum period of incarceration of ninety days.

community at large. Focusing on public activity rather than status, the statute attempts to regulate and control commercial and noncommercial solicitations for deviate activity as well as public acts of sodomy as a means of preserving the public order.

Not only do Respondents challenge the alleged arbitrary enforcement of the statute, but they also challenge the failure of the statute to give adequate notice of the conduct which it proscribes. Under the facts of this case, neither Respondent can complain of any lack of notice since the conduct of each falls clearly within the ambit of the statute.

Notably Respondent Uplinger's motion to dismiss the charge on the ground that the facts set forth failed to establish the offense charged (Joint App. 13), a necessary precursor to his particular vagueness challenge, was withdrawn upon Uplinger's stipulation that his words spoken constituted an offer to commit an act of deviate sexual intercourse, i.e. oral sodomy (Joint App. 82). The conduct of Respondent Butler, like that of Respondent Uplinger, was equally embraced by the statute; her public solicitations directed toward passing cars were followed by the commission of an act of oral sodomy observed by the arresting officer. At *nisi prius* Butler made no motion contesting the sufficiency of the factual allegations. Since there can be no claim by either Respondent that the sexual conduct proposed or engaged in was not within the clear terms of the statute, there can be no claim of vagueness with respect to their particular acts.

Nor may a challenge to the phrase "other sexual behavior of a deviate nature" be deemed a facial attack on the statute. A "facial" challenge to the vagueness of the statute embraces the concept "that the law is 'invalid *in toto* — and therefore incapable of any valid application.' *Steffel v. Thompson*, 415 U.S. 452, 474, 94 S.Ct. 1209, 1223, 29 L.Ed.2d 505 (1974)." *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362, 369 (1982), n. 5. Even if it is

assumed that the Respondents, whose conduct is clearly embraced within the statute, may assert facial vagueness, the specific contention herein is predicated solely upon the alleged infirmity of one portion of the statute, i.e. the phrase "other sexual behavior of a deviate nature." Accordingly the attack does not constitute a valid facial challenge inasmuch as it does not reach the statute *in toto*. In this context the challenge is precluded under controlling precedent.

Since this statute, both on its face and as applied, provides clear notice as to the conduct proscribed and is not susceptible to arbitrary and discriminatory enforcement, it may not be deemed unconstitutionally vague.

III

New York Penal Law §240.35 subd. 3 violates neither the right to privacy nor the right to equal protection.

As stated by the New York Court of Appeals, its decision on the issue of constitutionality in the instant case reflected and relied upon the court's earlier reasoning in *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980) cert. den. 451 U.S. 987, 101 S.Ct. 2323, 68 L.Ed. 2d 845 (1981). Finding that Penal Law §240.35 subd. 3 "suffers the same deficiencies as did the consensual sodomy statute," the court implicitly determined that said statute violated the right to equal protection under the law and the right to privacy as both are guaranteed by the federal Constitution. Respondent Uplinger concurs in the court's analysis, arguing specifically that his right to privacy was abridged because his intent was to commit the solicited act of sodomy at his "personal residence" and further that he suffered a violation of his right to equal protection because, "In addition to the discriminatory enforcement which is in fact practiced, the statute's provisions are virtually unenforceable except as against homosexuals. . . ." (Uplinger Brief 39, 34)

Privacy

Neither the Court of Appeals nor the Respondent Uplinger acknowledged the proper distinction to be made between the consensual sodomy statute which relates to a person's right to commit acts of deviate sexual intercourse in private and the instant loitering law which focuses on the act of soliciting as it occurs in public. While conceding that under *Onofre* Respondent Uplinger's private acts of sodomy would not be illegal, it is the Petitioner's position that the right to privacy does not encompass one's acts on a public street where such acts infringe upon the right of others to public order and tranquillity. Indicative of the State's legitimate authority to regulate acts in public which are protected in private is the case of Respondent Butler. Her act of sodomy, committed in an automobile on a public street, even in the absence of proof of the commercial nature of the transaction, is clearly not protected by the Constitution under the penumbral right to privacy. The enactment of statutes proscribing such public activity is undeniably within the valid legislative power of the State.

This distinction between public and private is exemplified by this Court's decisions in the companion cases of *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971), and *United States v. Reidel*, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971). In both cases, appellees urged that individuals should be entitled to import or to mail obscene materials which would subsequently be used in private relying upon the Court's language in *Stanley v. Georgia*, 394 U.S. 557, 565, 89 S.Ct. 1243, 1248, 22 L.Ed.2d 542, 550 (1969), that "a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." This Court rejected the contentions, holding in *Thirty-Seven Photographs*:

"That the private user under *Stanley* may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce. *Stanley's* emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search." 402 U.S. at 376, 91 S.Ct. at 1408, 28 L.Ed.2d at 834.

This distinction was further delineated in *Reidel*:

"The focus of this language [as cited in *Stanley*] was on freedom of mind and thought and on the privacy of one's home. It does not require that we fashion or recognize a constitutional right in people like *Reidel* to distribute or sell obscene materials. The personal constitutional rights of those like *Stanley* to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and view that material in private are independently saved by the Constitution." 402 U.S. at 356, 91 S.Ct. at 1412-1413, 28 L.Ed.2d at 817-818.

As applied to the case at bar, such analysis indicates that protection of sexual behavior conducted in private between consenting adults is not a proper predicate for invalidation of legislation prohibiting public solicitation to engage in deviate sexual activity. In contradistinction to the restraints imposed upon access to obscene materials in *Reidel* and *Thirty-Seven Photographs*, a restriction on loitering in public for the purpose of soliciting or engaging in deviate sexual acts does not foreclose access to sexual partners. Under the foregoing analysis, Respondent Uplinger's assertion that he intended the act of sodomy to take place in the privacy of his home is insufficient to support his contention that his public acts were protected by a constitutional right to privacy.

In a somewhat different vein, Respondents contend that even restaurants and taverns could improperly become the situs of arrest under the instant loitering statute despite a clearly protected right to privacy enjoyed by patrons in such establishments. The New York Penal Law definition of "public place"¹⁰ indeed appears to include a tavern, although intuitively such places of business are less "public" than city streets inasmuch as people are present by choice rather than necessity, children are for the most part excluded, and those who are easily offended are generally not in attendance.

Assuming, however, that such establishments do fall within the statutory definition of "public place," a statutory prohibition of loitering for the purpose of soliciting or engaging in deviate sexual activities which extends to such premises does not impermissibly abrogate the constitutionally protected right to privacy of a solicitor. The legislative intent to protect citizens from harassing solicitations obviously transcends the walls of restaurants and bars; people enjoying food or drink in such public places certainly cannot, due to mere presence, be characterized as receptive to sodomous solicitations.

Even with respect to bars catering to a homosexual population, neither the Record nor the briefs, including those of *amici*, establish that homosexuals who frequent such businesses are receptive to impulsive, indiscriminate sexual solicitations. Unquestionably, solicitations by homosexual prostitutes would constitute an annoyance to many homosexual persons no matter where delivered. Moreover, as long as such establishments remain public, the danger exists that those who enter unaware of the sexual preferences of the majority of the clientele might unexpectedly experience offense.

In reality, Respondents assert their right to solicit others

¹⁰New York Penal Law §240.00 subd. 1.

based upon their own receptiveness to or predilection for such solicitations. Such reasoning is analogous to that of a disorderly and intoxicated individual who maintains his right to be publicly intoxicated merely because he personally is not offended by the public conduct of others similarly inebriated. The appropriate response to both the public drunk and the public solicitor is that their conduct should be restricted to private premises such as private clubs whose patrons are put on notice as to what activities are tolerated. In the alternative their energies should be directed toward convincing the Legislature that their conduct, contrary to lawmakers' perceptions, is no longer offensive to the general public.

Equal Protection

The Court of Appeals' reasoning in applying an equal protection analysis to the statute at issue is similarly flawed. Conceding for purposes of this case that the court properly invalidated the New York State consensual sodomy law as violative of the equal protection of unmarried persons, such decision is in no way determinative of the constitutionality of the statute at issue. While the statute does exclude from its sweep married persons who solicit their spouses in public areas while loitering, as noted in Petitioner's Brief, such exemption is not unrelated to the objective of the statute which is to "protect members of the public from being harrassed by indiscriminate solicitations of a lewd and intimate kind made by persons whom the solicitee neither knows nor seeks to know." (Petitioner Brief 28-29)

With respect to Respondent Uplinger's contention that the statute violates equal protection in that "the primary reach of the statute is directed to homosexuals" (Uplinger Brief 34), it is submitted that such assertion is definitively refuted by the posture of the instant case which includes not only Uplinger but

Butler who was arrested while performing a heterosexual act of deviate sex. The statute does not legislate that different treatment be accorded to persons placed by statute into different classes but rather focuses on an act which can be and, as indicated by the case at bar, is committed by both men and women and by persons who are heterosexual as well as homosexual in their preferences. All persons, not distinguished by statutory classification save for the above noted rational exemption for persons married, are treated alike.

IV

Review is in no sense prohibited by the action of the court below.

Respondent Uplinger argues under Point II of his brief that the New York Court of Appeals first narrowed Penal Law §240.35 subd. 3 by statutory construction, then determined that, as construed, the statute was unconstitutional. He concludes that this Court is bound by the alleged construction in reviewing the correctness of the finding of unconstitutionality.

It should from the outset be emphasized that the New York Court of Appeals, rather than giving any saving construction, totally invalidated Penal Law §240.35 subd. 3. Statutory construction, of necessity, entails a determination as to the proper meaning or application of provisions contained in legislative acts (Black's Law Dictionary, 5th ed., McKinney's Statutes §71). In the instant case, the court below made no attempt to explain the meaning of any of the statutory elements of the offense nor did it proffer any conclusions with respect to the questions of how, where, when or to whom the statute at issue should be applied.

In addition it has been determined that the general intent of statutory construction is to maintain the spirit and purpose of

the statute while bringing it into harmony with constitutional requirements thus obviating the necessity for constitutional review by a higher court (*Thirty-Seven Photographs*, 402 U.S. 363, 369, 91 S.Ct. 1400, 1404, 28 L. Ed. 2d 822, 830 (1971), McKinney's Statutes §96). The court attempted no interpretation of the law which could conceivably effect these purposes.

In invalidating the statute at issue the court did not construe but rather merely presented its reasoning for a finding of unconstitutionality. Its analysis was based solely upon its determination that Penal Law §240.35 subd. 3 "must be viewed as a companion statute to the consensual sodomy statute" (Pet. for Cert. App. B 2b). The court reasoned:

"The object of the loitering statute is to punish conduct anticipatory to the act of consensual sodomy. Inasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose. This statute, therefore, suffers the same deficiencies as did the consensual sodomy statute." (Pet. for Cert. 2b)

As stated by this Court in *New York v. Ferber*, ____ U.S. ____, 102 S.Ct. 3348, 3360, 73 L. Ed. 2d 1113, 1129 (1982): "While the construction that a state court gives a state statute is not a matter subject to our review, [citations omitted], this Court is the final arbiter of whether the federal constitution necessitated the invalidation of a state law. It is only through this process of review that we may correct erroneous applications of the Constitution that err on the side of an overly broad reading of our doctrines and precedents, as well as state court decisions giving the Constitution too little shrift." In that the court's finding of unconstitutionality rested exclusively upon legal reasoning linking the consensual sodomy statute to the instant loitering statute, Respondent cannot properly assert that such legal reasoning should be immune from review by this Court.

Furthermore, as expressed by the Court of Appeals in its Memorandum, "We do not hold that the Legislature cannot enact a law prohibiting a person from accosting another in an offensive manner or in 'an inappropriate place *even if the underlying purpose is not in violation of the law.*'" (Pet. for Cert. App. B 2b, emphasis added). The legality or illegality of consensual sodomy as committed in private is thus not relevant to a determination of the validity of a statute proscribing public loitering for the purpose of soliciting; the gloss provided Penal Law §240.35 subd. 3 by Penal Law §130.38 may explicate but does not limit the meaning of the statute at issue and, therefore, cannot limit this Court's review of the statute as written by the Legislature.

The court also reasoned that the challenged statute could not be categorized as a harassment statute since it is devoid of a requirement that the conduct proscribed be offensive or annoying to another. Such argument does not narrow or define the statute, nor does it prevent this Court from validating the ostensible legislative intent to hold persons strictly liable for the public offense of loitering to solicit abnormal sexual activity, an act determined to be "a source of annoyance to, and harassment of, members of the public who do not wish to become involved." (Model Penal Code, §251.3, Comment, at p. 476)

Not only is the above reviewable because it represents reasoning rather than construction, but to the extent that it presents a position in opposition to that of the Legislature or attempts to define legislative intent, such a conclusion is not binding upon this Court. As stated in *Ward & Gow v. Krinsky*, 259 U.S. 503, 42 S.Ct. 529, 66 L.Ed. 1033:

"Any suggestion from the state court in aid of the act fairly may be accepted; but a suggestion having an adverse effect, while entitled to respectful consideration, is not to be taken as weakening the action taken by the state through its legislative branch, or as furnishing an exclusive statement of the grounds upon which the Legislature acted." 259 U.S. at 520, 42 S. Ct. at 536.

In sum, it is submitted that the Memorandum decision of the New York Court of Appeals represents an invalidation, not a construction, of the statute at bar. The issue presented by the legal reasoning of the court, i.e. whether the Constitutional protections afforded an individual's right to privacy extend to immunize public conduct which the Legislature has determined to be an annoyance or nuisance to others, cannot be precluded from review by this Court.

CONCLUSION

THE JUDGMENT OF THE NEW YORK STATE COURT OF APPEALS SHOULD BE REVERSED.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

**MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*
AND BRIEF OF THE AMERICAN ASSOCIATION FOR
PERSONAL PRIVACY, THE SEX INFORMATION AND
EDUCATION COUNCIL OF THE UNITED STATES
(SIECUS), THE COALITION ON SEXUALITY AND DIS-
ABILITY, AND THE SOCIETY FOR THE SCIENTIFIC
STUDY OF SEX**

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No. 82-1724

In the
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October Term, 1983

STATE OF NEW YORK,

Petitioner,

v.

ROBERT UPLINGER,

Respondent.

ON WRIT OF CERTIORARI TO THE
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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE
AND BRIEF OF THE AMERICAN ASSOCIATION
FOR PERSONAL PRIVACY, THE SEX INFORMATION
AND EDUCATION COUNCIL OF THE UNITED STATES
(SIECUS), THE COALITION ON SEXUALITY AND
DISABILITY, AND THE SOCIETY FOR THE
SCIENTIFIC STUDY OF SEX.

The undersigned, as counsel for the
American Association for Personal Privacy, the
Sex Information and Education Council of the
United States (SIECUS), the Coalition on
Sexuality and Disability, and the Society for
the Scientific Study of Sex, respectfully

moves this Court for leave to file the accompanying brief amici curiae.

Amici organizations have all been actively involved in bringing contemporary research on sexuality to bear on the articulation and effectuation of the fundamental right of consenting adults to autonomy in sexual expression, believing that freedom and rationality in choosing sexual relations in one's own personal way is a basic human good and the indispensable moral condition of a mature and responsible personal life. Amici organizations support the right of consenting adults to sexual autonomy in their personal lives, and the elaboration, dissemination, and development of sexual knowledge and supportive professional care adequate to the responsible exercise of this basic human right. Amici believe that People v. Onofre, 51 N.Y.2d 476 (1980), cert. den. 451 U.S. 987 (1981) is a correct recognition of this basic human right as an aspect of the fundamental constitutional right to privacy, and are concerned that the validity and importance of this right be given proper weight in the judicial consideration of correlative rights of solicitation. They join here so to argue.

THE AMERICAN ASSOCIATION FOR PERSONAL PRIVACY (AAPP) is a non-profit California corporation that promotes education within the legal profession regarding the right to privacy and, particularly, its application to sexual civil liberties. One of its founders, Professor Walter E. Barnett, wrote the seminal study of sexual civil liberties, Sexual Freedom and the Constitution, University of New Mexico Press: Albuquerque, 1973; and the AAPP's educational functions have included publication of the Sexual Law Reporter from 1974 to 1980. The nationwide membership of the AAPP, chosen on an invitational basis of professional achievement, includes, in its committees, scholars and practitioners in the fields of law, history, sociology, psychology, and theology. The AAPP, through its committees and members, has participated in a number of cases in various areas as follows: challenges to fornication laws: State v. Saunders, 1977, 75 N.J. 200, 381 A.2d 333; challenges to sodomy laws involving private conduct between persons above the age of consent: Buchanan v. Batchelor (N.D. Texas 1970) 308 F. Supp. 729, rev. on procedural grounds, Wade v. Buchanan, 1971, 401 U.S. 989; Commonwealth v. Bonadio, 1980, 490 Pa. 91, 415

A.2d 47; People v. Onofre, 1980, 51 N.Y.2d 476, 415 N.E.2d 936 cert. den. 451 U.S. 987 (1981); attacks on state solicitation laws involving noncommercial sexual solicitations: Pryor v. Municipal Court, 1979, 25 Cal.3d 238; State v. Phipps, 1979, 58 Ohio State 2d 271, 389 N.E.2d 1128; State v. Tusek (Oregon App. 1981), 630 P.2d 892; Commonwealth v. Sefranka (Mass. 1980), 414 N.E.2d 602; challenges to loitering laws: People v. Gibson, 1974, 184 Colo. 444, 521 P.2d 774; People v. Ledenbach, 1976, 61 Cal. App.3d, Supp. 2; and attacks on employment discrimination on grounds of sexual orientation: Gay Student Services v. Texas A & M (5th Cir. 1980), 612 F.2d 160; Gay Law Students Association v. Pacific Telephone, 1979, 25 Cal.3d 458.

THE SEX INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES (SIECUS), affiliated with the Department of Health Education of the School of Education, Health, Nursing and Arts Professions of New York University, is a voluntary health organization which, since its founding in 1964, has publicly affirmed its belief that freedom to exercise sexual choice is a fundamental human right; that such freedom of sexual choice carries with it responsibility to self and others; and that these

responsibilities call for acquiring knowledge and developing a personal ethical code. As a clearinghouse for authoritative sexual information for professionals of all disciplines and people of every age, SIECUS provides an information service based on an extensive collection of resource books, journals, and other material in the field of sexuality. At present, its professional staff responds to over 5000 inquiries annually. Its professional publication, The SIECUS Report, continually reviews new research, books and materials, and its publications for the lay public have translated what is known to be true about human sexual behavior into commonly understood language. Thus, SIECUS is in a position to both understand and interpret the growing knowledge base on human sexuality, as well as be aware of the concerns of both professionals and the public at large through responding to inquiries. SIECUS joins this brief in order to assure that certain social and psychological factors connected with this issue are properly before the Court.

THE COALITION ON SEXUALITY AND DISABILITY, INC. is a network of people, both disabled and able bodied, professionals and consumers of services, committed to education

and advocacy in assisting citizens with disabilities achieve full integration into society with confidence in their sexuality. The organization grew out of the identified need of people with disabilities to gain accurate, accessible, and appropriate sexual health services. The Coalition's scope of concern essentially includes the sexual well-being of women and men with chronic illnesses and physical disabilities. For example, an estimated 50% of the 11 million diabetics in this country experience sexual dysfunction related to their disease; anti-hypertensive medications are a leading cause of sexual dysfunction for 35 million Americans with high blood pressure; and sexual dysfunction is associated with diseases of the prostate, arthritis, multiple sclerosis, kidney disease, spinal cord injury as well as numerous drugs for the treatment of health problems. Sex education and counseling help individuals learn the available options for sexual satisfaction from which they may choose behaviors that suit their needs, beliefs and values. The Coalition joins this brief in opposition to state restrictions that limit the individual's right to learn, to adapt, and to enjoy loving rela-

tionships as an expression of a healthy sexuality.

THE SOCIETY FOR THE SCIENTIFIC STUDY OF SEX, now in its twenty-seventh year, is an international professional association of researchers, clinicians and educators who share an interest and competency in the scientific pursuit of knowledge concerning sexuality. The Society supports the study of sexuality as a valid area for research and promotes interdisciplinary cooperation among professionals committed to the scientific study of sexuality through publication of The Journal of Sex Research and The Society Newsletter, the maintenance of membership directories and judicial resource files, and the sponsorship of both regional and national meetings annually of leaders in the field of sex research. The Society's activities span the range of disciplines represented by its members, conference participants, and journal authors. The contributions of and dialogue between biologists, nurses, therapists, psychologists, sociologists, anthropologists, historians, physicians, educators and theologians insure a broad interdisciplinary approach to the investigation of human sexuality. Since 1957, when the Society was found-

ed, it has been committed to the principle that views about sexuality, previously based largely on speculation, must now receive the benefit of rigorous and systematic empirical investigation. The Society joins this brief as an application of this principle to law: advances in the scientific knowledge of sexuality must, above all, replace the unscientific forms of speculation which can no longer defensibly be urged in defense of coercive restrictions on responsible sexual freedom.

Counsel has sought the consent of the parties to file this brief amici curiae. Counsel for respondent, Robert Uplinger, has consented; counsel for petitioner has denied this request.

Respectfully submitted,

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DISABILITY, AND THE SOCIETY FOR
THE SCIENTIFIC STUDY OF SEX.

This brief is submitted by the under-
signed amici curiae conditionally upon the
granting of the motion for leave to file to
which it is attached.

Interest of Amici

The interest of the amici is set forth in the attached motion for leave to file.

Summary of Argument

Amici address this brief to one issue: the justifiability of the ruling of the New York Court of Appeals in People v. Onofre, 51 N.Y.2d 476 (1980), cert. den. 451 U.S. 987 (1981), that decisions by adults to engage in private consensual sexual activity are protected by the constitutional right to privacy. The decision of the Court of Appeals in State v. Uplinger, 58 N.Y.2d 936 (1983), on writ of certiorari in the Supreme Court here, is based on its previous decision in Onofre. Accordingly, the interpretation of the constitutional argument in Onofre must importantly shape the cognate argument in Uplinger. For example, if, as amici believe and will argue herein, Onofre properly rests on the dignity of a fundamental constitutional right, the considerations of constitutional neutrality, central to Uplinger, must be reinforced.¹

¹ The Supreme Court's usual first amendment concern that regulations of speech be content neutral is, if anything, heightened by regulations of speech communicating information
(footnote continued)

The Supreme Court has stated that:

"...the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults," Carey v. Population Services, 431 U.S. 688 at n. 5 (1977).

The Court's summary affirmance without opinion of Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D.Va. 1975), aff'd without opinion 425 U.S. 901 (1976), accordingly, leaves this question unresolved. Cf. Onofre, cert. den. 451 U.S. 987 (1981).² Such controversial questions, as much about the legitimacy as the application of the constitutional right to privacy, have characterized discussion of the right since Griswold v. Connecticut, 381 U.S. 479 (1965) and its later elabo-

(footnote continued from previous page)
relevant to the exercise of the constitutional right to privacy, for content neutrality may here protect, as well, against hostile prejudice against exercise of fundamental rights. See Bigelow v. Virginia, 421 U.S. 809 (1975).

² Amici subscribe to the fuller discussion of this point by Judge Buckmeyer in Baker v. Wade, 553 F. Supp. 1121, 1135-1140 (N.D.Tex. 1982).

rations.³ Amici submit that Onofre correctly resolves this further "difficult question" (431 U.S. 688 at n. 5) of application consistent with the most coherent, sensible, and just reading of the case law and a sound defense of the historical and interpretive legitimacy of the Court's elaboration of this right.

In brief, the right to constitutional privacy is a coherent elaboration of a historically entrenched, abstract background right of voluntary association, a right of the person associated in the first amendment with religious, political, and ideological associations, but clearly understood by the Founders to apply to intimate associations like marriage as well. Accordingly, consistent with the Court's traditional role in elaborating abstract background rights, the right to constitutional privacy has properly been developed to protect aspects of decisions regarding intimate associations. Onofre coherently elaborates this right to encompass persons' decisions regarding forms of sexual expression in their intimate relations.

³ Consider, for example, J. H. Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," 82 Yale L.J. 920 (1973).

Coercive prohibitions, which compromise this underlying fundamental right, can be justified if they satisfy a constitutionally required burden of argument of protecting relevant equal rights of adult persons to neutral goods of life, bodily integrity, security, and the like and the rights of children to developmentally appropriate care and nurturance. This burden cannot be satisfied by forms of argument, which, on constitutionally reflective examination, do not protect the equal rights of persons to neutral goods, but represent the kinds of ultimate disagreements about values and ways of living among which central constitutional values of toleration command state neutrality. Statutes, of the kind struck down in Onofre, cannot satisfy the constitutional burden of argument required for coercive abridgement of fundamental rights. Rather, these statutes work constitutionally unjust and degrading harms to persons in precisely the ways that the right to constitutional privacy forbids.

ARGUMENT

I.

THE ABSTRACT BACKGROUND RIGHT, WHICH THE CONSTITUTIONAL RIGHT TO PRIVACY ELABORATES, ENCOMPASSES THE INDEPENDENT DECISIONS OF PERSONS REGARDING THE FORMS OF SEXUAL EXPRESSION CENTRAL TO THE INTEGRITY OF THEIR INTIMATE RELATIONSHIPS.

Controversy over the nature, provenance, and application of the constitutional right to privacy has followed in the wake of each of the Supreme Court's decisions extending the right: to the use of contraceptives, Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); to the use of obscene materials in the privacy of one's home, Stanley v. Georgia, 394 U.S. 557 (1969); and to the use of abortion services, Roe v. Wade, 410 U.S. 113 (1973). Amici submit that the most coherent and just interpretation of this case law converges with a sound defense of the historical and interpretive legitimacy, indeed necessity, of the elaboration of the right.

The maintenance of a continuous yet vital constitutional tradition in the United States has required the Supreme Court often to interpret relevant constitutional text in terms of

abstract background rights (equal liberties of religion or speech, equal treatment, cruel and unusual punishment, etc.).⁴ Continuity is insured by the common appeal to an abstract intention in different historical periods; vitality, by the Court's duty reasonably to articulate changes in the scope of application of the common concept in light of each generation's best arguments and experience about what should count as basic liberties of the person,⁵ or the demands of equality,⁶ or

⁴ One useful way of putting this point is to note the way in which constitutional interpretation in the United States over time appeals to a stable concept (of fairness, for example), but each constitutional generation articulates a different conception of the underlying concept. See R. M. Dworkin, Taking Rights Seriously, Harvard University Press: Cambridge, Mass., 1977, at pp. 134-136.

⁵ For example, the generation which approved the free speech clause of the first amendment would almost certainly not have applied it to seditious libel prosecutions. See Leonard W. Levy, Legacy of Suppression, Harvard University Press: Cambridge, Mass., 1964. Yet, contemporary case law quite properly views such prosecutions as at the core of the prohibitions of the free speech clause. See New York Times v. Sullivan, 376 U.S. 254 (1964).

⁶ The contemporary constitutional conception of equal protection clearly interprets the
(footnote continued)

unjustly disproportionate punishment.⁷

The constitutional right to privacy was elaborated by the Supreme Court consistent with this traditional approach to its interpretive task. There is a powerful historical argument that the generation who drafted and approved the Constitution and Bill of Rights thought of these documents as protecting not only enumerated rights, but unenumerated basic human rights as well.⁸ There can be little

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idea more expansively than the conception of previous generations. See Brown v. Board of Education, 347 U.S. 483 (1954); Frontiero v. Richardson, 411 U.S. 677 (1973).

⁷ See, for example, Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976).

⁸ For example, the leading academic critic of the constitutional right to privacy, John Hart Ely, expressly denies that either textual or historical argument belies the legitimacy of the Court's inference of the right; to the contrary, Ely argues that the best textual and historical inference is that the ninth amendment was intended to make clear that unenumerated rights like constitutional privacy were to be enforceable against the federal government, in the same way that the privileges and immunities clause of Article IV contemplates a distinction between unenumerated fundamental and non-fundamental rights. John Hart Ely, Democracy and Distrust, Harvard University
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historical doubt that one such assumed basic human right was the natural right to marriage,⁹ and there is quite good historical reason indeed to suppose that this right was thought of as one, non-exclusive example of a more abstract right of voluntary association.¹⁰ Since these assumptions are appealed to by one or another of the clauses of the

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 Press: Cambridge, Mass., 1980, at pp. 34-41, 22-30.

⁹ For example, Hutcheson's widely read and studied works list, among other fundamental human rights, "the natural right each one has to enter into the matrimonial relation with any one who consents," p. 299, Francis Hutcheson, A System of Moral Philosophy, [1755], Augustus M. Kelley, Publishers: New York, 1968.

¹⁰ Striking evidence of this way of thinking appears in the lectures of John Witherspoon, a form of which James Madison heard and studied while a student at Princeton. Witherspoon, tracking Hutcheson's list of basic human rights, lists a "right to associate, if he so incline, with any person or persons, whom he can persuade (not force) -- under this is contained the right to marriage," John Witherspoon, Lectures on Moral Philosophy, Jack Scott, ed., Associated University Presses: Each Brunswick, N.J., 1982, at p. 123.

fourteenth amendment,¹¹ the Supreme Court quite properly has deployed interpretations of the abstract right of voluntary association in its elaboration of the first amendment guarantees of liberty of religion and speech, understood as protecting, inter alia, rights to associate for various religious, political, philosophical, and other purposes.¹² For the same reasons, the Court has properly elaborated as well a right to constitutional privacy originating precisely in the right to marriage historically understood as one central example of the more abstract right to association. Griswold. Consistent with the abstract nature of its background right, later cases have elaborated the right beyond inti-

¹¹ Ely puts particular weight here on the privileges and clause of the fourteenth amendment, which, he believes, importantly incorporates the idea of unenumerated fundamental rights from the privileges and immunities clause of Article IV. See J. H. Ely, op. cit., pp. 22-30. The Supreme Court, of course, has placed the inference of unenumerated rights on the due process clause of the fourteenth amendment. See, e.g., Roe v. Wade, 410 U.S. 113 (1973).

¹² See, e.g., NAACP v. Alabama, 357 U.S. 449 (1958); Shelton v. Tucker, 364 U.S. 479 (1960).

mate relations in marriage. Eisenstadt v. Baird; Stanley v. Georgia; Roe v. Wade.

The principle of these cases rests on the vindication of a right of intimate association the coercive prohibition of which by state laws cannot satisfy their constitutionally required burden of justification.¹³ In Griswold, for example, the state prohibition on the use of contraceptives in marriage limited the basic right of married couples to regulate the form of their sexual lives and their procreative consequences in forming new intimate relations with offspring. Such state prohibitions could not satisfy the constitutional burden of protecting the rights of other persons: on the contrary, legitimate state purposes of population control may thus be advanced. And, they could not reasonably be supposed to protect persons from self-destructive harms to self: in fact, contraceptive use in marriage has secured to couples the dignity of a deepened freedom and rationality of sexual expression in their intimate personal lives and greater control over their reproductive histories and other personal

¹³ See, for example, Kenneth I. Karst, "The Freedom of Intimate Association," 89 Yale L.J., 624 (1980).

aims. Any residual justification of these laws appears, on constitutionally reflective examination, to be grounded in an ideal of the necessary link of sex and procreation which cannot satisfy the constitutionally neutral burden of justification to the many reasonable persons who do not share this ideal. If criminal prohibitions on use of contraceptives, abortion services, and of obscene materials in the home must be subjected to such exacting constitutional scrutiny, criminal statutes forbidding forms of sexual intimacy (oral and anal sex, in particular) deserve no less. Amici submit that the best contemporary evidence about the nature and role of sexuality in the life of the person makes clear the rightful dignity, grounded in the traditional American commitment to an abstract right of voluntary association, of the right of persons to engage in forms of sexual expression central to the integrity of their intimate relations and personal lives.¹⁴

¹⁴ The pervasive imaginative force of human sexuality in the life of the person, in contrast to the procreational periodicity of animal sexuality, is at the heart of Freud's central innovations in modern thought. See S. Freud, "'Civilized' Sexual Morality and Modern Nervous Illness," 9 The Complete Psychological
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In particular, criminalization of forms of oral and anal sex coercively abridges this fundamental right of three significant groups of persons: (1) many heterosexual men and women; (2) certain disabled people; and (3) homosexual men and women.

(1) Heterosexual men and women. The classic Kinsey and later studies make clear that large and growing numbers of heterosexual women and men regard forms of oral and anal sex as important options of sexual fulfillment central to the integrity of their intimate relationships.¹⁵ Indeed, professional thera-

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Works of Sigmund Freud, 181, 187 (standard ed. 1908), Hogarth Press: London, 1959. For important confirmation of comparative ethology and anthropology, see C. D. Ford & F. A. Beach, Patterns of Sexual Behavior, Harper, 1951, at pp. 199-267.

¹⁵ The early Kinsey studies found, for example, that 15% of high school educated men engaged in cunnilingus or experienced fellatio in marriage, and 45% of college educated men engaged in cunnilingus and 43% experienced fellatio (A. C. Kinsey, et al., Sexual Behavior in the Human Male, W. B. Saunders: Philadelphia, 1948, p. 371), and that 50% and 46% of high school educated women experienced cunnilingus or engaged in fellatio, respectively, in marriage, and 58% and 52% of college educated women, respectively (A. C. Kinsey, et
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pies for sexual dysfunction include today, if the couple wishes, oral and anal sex techniques to enhance the mutual pleasure of the sexual experience.¹⁶

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 al., Sexual Behavior in the Human Female, W. B. Saunders: Phil., 1953, p. 399). By 1974, 56% and 54% of high school educated men engaged in cunnilingus and fellatio, respectively, in their marriages; and 66% and 61% of college educated men, respectively; 58% and 52% of high school educated women engaged in cunnilingus and fellatio, respectively in marriage; and 72% of college educated women engaged in both. M. Hunt, Sexual Behavior in the 1970's, Playboy Press: Chicago, 1974, at p. 198. By 1983, the percentages of heterosexual couples reporting fellatio were as follows: 5% every time they had sex, 24% usually, 43% sometimes, 18% rarely, 10% never; the percentage reporting cunnilingus were: 6% every time, 26% usually, 42% sometimes, 19% rarely, 7% never. P. Blumstein & P. Schwartz, American Couples, Morrow: N.Y., 1983, at p. 236. In the same study, heterosexual men who receive oral sex are happier with their relationships in general (*id.*, pp. 231-233); women report no comparable increment (*id.*, pp. 233-237). The Kinsey studies found heterosexual anal sex quite infrequent (Kinsey, 1948, p. 579; P. H. Gebhard & A. B. Johnson, The Kinsey Data, Saunders: Phil., 1979, at pp. 304, 383). By 1974, half of the younger married respondents reported finding forms of it acceptable in love. M. Hunt, *op. cit.*, pp. 199-200. Other, more informally gathered samples confirm all these trends in the data. See, *e.g.*, S. Hite, The Hite
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(2) Disabled People. In working with persons whose sexual function is significantly altered by illness or disability, rehabilitation counselors, nurses, doctors, social workers, and others discuss and teach about sexual techniques as part of patient education. In the absence of capacity for erection of the penis or in view of limitations in body movement, oral sex is a primary, sometimes exclusive way for many couples to experience continued sexual expression.¹⁷ Such forms of disability include arthritis and other mobil-

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Report, Macmillan: N.Y., 1976; A. Pietropinto & J. Simenauer, Beyond the Male Myth, Times Books: N.Y., 1977; C. Tavis & S. Sadd, Red-book Report on Female Sexuality, Delacorte: N.Y., 1975; S. Hite, Hite Report on Male Sexuality, Ballantine: N.Y., 1981; L. Wolfe, Cosmo Report, Arbor House: N.Y., 1981.

¹⁶ See, in general, L. Barbach, Women Discover Orgasm, Free Press: N.Y., 1980; H. S. Kaplan, The New Sex Therapy, Brunner/Mazel: N.Y., 1974; W. H. Masters & V. Johnson, Human Sexual Inadequacy, Little, Brown: Boston, 1970; J. & L. LoPiccolo, ed., Handbook of Sex Therapy, Plenum: N.Y., 1978.

¹⁷ See the references cited at note 16, supra. See also A. Comfort, More Joy, Simon & Schuster: N.Y., 1975, pp. 210-213.

ity problems,¹⁸ multiple sclerosis,¹⁹ spinal cord injury resulting in paraplegia and quadriplegia and known side effects from medication,²⁰ diabetic disabilities,²¹ cancer surgery in the vaginal area,²² cardiac disabilities,²³ etc.

(3) Homosexual men and women. Intimate relationships of homosexual women and men

¹⁸ M. Diamond & A. Karlen, Sexual Decisions, Little, Brown: Boston, 1980, p. 140; Jo-An Boggs, Living and Loving with Arthritis, Arthritis Center of Hawaii: Honolulu, 1978.

¹⁹ M. Barrett, Sexuality and Multiple Sclerosis, Multiple Sclerosis Society of Canada: Toronto, 1982, pp. 20-22.

²⁰ T. O. Mooney, T. M. Cole, & R. A. Chilgren, Sexual Options for Paraplegics and Quadriplegics, Little, Brown: Boston, 1975, pp. 73-83; N. F. Woods, Human Sexuality in Health and Illness, 2d ed., C. V. Mosby: St. Louis, 1979, at pp. 358-359.

²¹ S. A. Kaufman, Sexual Sabotage, Macmillan: N.Y., 1981, p. 134.

²² M. E. Clark & J. Magrina, Sexual Adjustment to Cancer Surgery in the Vaginal Area, University of Kansas Medical Center: Kansas City, 1983, pp. 36-39; also, brochure appendix thereto, pp. 1-12.

²³ R. M. Hogan, Human Sexuality, Appleton-Century-Crofts: N.Y., 1980, p. 638; S. Cambre, The Sensuous Heart, Pritchett & Hull: Atlanta, 1978, p. 13.

include oral sex as a primary option, and, for homosexual men, anal sex as well.²⁴

Criminalization of all these forms of sexual expression abridges, accordingly, important, exclusive, or primary ways in which many persons in our society naturally feel and express sexual love for one another, voluntarily bond their lives to one another in the intimate relations central to the integrity of their personal lives, and, indeed, sustain, with the assistance of health professionals,²⁵ the sexual expression of their personal relationships. Amici wish to underscore the continuities in both the sexual experience and bonding which characterize the place these forms of sexual expression enjoy in the lives of diverse American couples today, facts attested by the many careful studies which

²⁴ See, for example, A. P. Bell & M. S. Weinberg, Homosexualities, Simon & Schuster: New York, 1978, pp. 106-115; P. Blumstein & Schwartz, op. cit., pp. 237-245.

²⁵ In addition to the works cited at notes 16 to 23, the range of professional journals dealing with these issues include the following: Archives of Sexual Behavior, Journal of Sex and Marital Therapy, Journal of Sex Education and Therapy, Journal of Sex Research, Medical Aspects of Human Sexuality, Sexual Medicine Today, and Sexuality and Disability.

have followed in the wake of Kinsey's classic studies.²⁶ It would blink reality, in this case facts bearing on fundamental constitutional rights, not to give them appropriate weight in elaborating the meaning of abstract background rights today in the constitutionally sensitive area of criminal coercion. The attempt by law to isolate and criminally condemn such forms of sexual expression violently deracinates such acts from the lives of the many persons for whom such acts express the meaning for them of their most profound and personally authentic feelings of affection, attachment, and mutual love. This brutal and callous impersonal manipulation by the state of intimate personal life is the same constitutional evil as that condemned by the Court in disallowing the legitimacy of state control of contraceptive use in sexuality or state control of women's use of their bodies for procreation. Such coercive laws

²⁶ For the continuities in the nature of sexual experience, see, especially, W. H. Masters & V. E. Johnson, Homosexuality in Perspective, Little, Brown: Boston, 1979. For continuities in both sexual experience and bonding, see P. Blumstein & P. Schwartz, American Couples, Morrow: New York, 1983.

must satisfy a heavy burden of constitutional justification; they cannot do so.

II.

CRIMINAL PROHIBITIONS ON FORMS OF SEXUAL
EXPRESSION LIKE THOSE STRUCK DOWN IN
ONOFRE CANNOT SATISFY THE CONSTITUTIONAL
BURDEN OF JUSTIFICATION REQUIRED TO ABRIDGE
CHOICES PROTECTED BY THE CONSTITUTIONAL
RIGHT TO PRIVACY.

Criminal prohibitions bearing on the right of constitutional privacy require a heavy burden of justification, which can, in principle, be met. There would, amici assume, be no constitutional objection to the application of neutral criminal statutes to intra-familial murders, or wife or husband beatings, or child abuse, no matter how rooted in intimate family life and sexuality; nor should there be any objection to rape laws if applicable to married or unmarried sexual intimacies. In these cases, the constitutional burden of justification is met: countervailing rights of persons justify coercive interference into intimate relations. On the other hand, criminal prohibitions on use of contraceptives or abortion services or use of obscene materials in the home could not meet the burden of justification: arguments of count-

ervailing rights were either too constitutionally non-neutral or controversial or speculative to satisfy the burden required to abridge such intimately personal sexual matters.

Criminal prohibitions on forms of sexual expression, clearly protected by constitutional privacy, satisfy this burden, if anything, less well.

The elaboration of the right to constitutional privacy in our law requires, for its intelligibility, a distinction between forms of reflective ethical argument which satisfy the constitutional burden required for its abridgement and other forms of argument which cannot meet this burden. Amici suggest that the relevant ethical approach, on which the privacy cases implicitly depend, is the abstract ethical perspective fundamental to Western conceptions of moral relations and specific to the commitment of American constitutionalism to respect for human rights, namely, treating other persons as one would oneself want to be treated, as a person with respect for one's basic demands for those liberties central to a free and self-governing person and moral agent.²⁷ Such equal respect

²⁷ See John Rawls, A Theory of Justice,
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for persons, which insures the basic liberties to form different religious, philosophical, and political allegiances, requires that the scope of the criminal law must itself express such respect for persons, in particular, by the protection and vindication of the claims of persons for the neutral goods all would require to lead their lives as free persons, irrespective of other ideological differences in basic religious or other commitments.

Accordingly, the state may justly enforce criminal statutes which enforce ethical principles that, on fair terms to all, protect the interests of adult persons in life, bodily security and integrity, security in institutional relationships and claims arising therefrom, etc. and may protect as well the rights of children for appropriate conditions of nurture and development.

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 Harvard University Press, 1971. The author of this brief has developed the ethical argument here deployed at much greater length in their application to the criminalization of consensual deviant sex in several articles. See Richards, "Sexual Autonomy and the Constitutional Right to Privacy," 30 Hastings L.J., 957 (1979); and, "Unnatural Acts and the Constitutional Right to Privacy," 45 Ford. L. Rev., 1281 (1977).

Certainly, such ethical principles dictate certain prohibitions and regulations of sexual conduct. For example, respect for the developmental rights of immature children would require that various rights, guaranteed to adults, not extend to persons lacking such rational capacities, such as children. Nor is there any objection to the reasonable and neutral regulation of obtrusive sexual solicitation as such or, of course, to forcible forms of intercourse of any kind. In addition, forms of sexual expression would be limited by other ethical principles: principles of not killing, harming or inflicting gratuitous cruelty (nonmaleficence); principles of paternalism in narrowly defined circumstances; and principles of fidelity.

Statutes that absolutely forbid oral and anal intercourse cannot be justified consistent with these principles. Such statutes are not limited to forcible or public forms of sexual intercourse, or sexual intercourse by or with children, but extend to private, consensual acts between adults as well.

The argument that such laws are justified by their indirect effect of stopping homosexual intercourse by or with the underaged as absurdly fails to meet the required constitu-

tional burden as the claim that absolute prohibitions on heterosexual intercourse could be thus justified. There is no reason to believe that homosexuals as a class are any more involved in offenses with the young than heterosexuals.²⁸ Nor is there any reliable evidence that such laws inhibit children from being naturally homosexual who would otherwise be naturally heterosexual. Sexual preference is settled, largely irreversibly²⁹ and as a

²⁸ See the classic Kinsey Institute study of sex offenders, P. H. Gebhard, et al., Sex Offenders, Bantam: N.Y., 1965; M. Hoffman, The Gay World, Bantam: N.Y., 1968, at pp. 89-92. In general, seduction of the young appears to be more centered on heterosexual rather than homosexual relations. See A. Bell & M. Weinberg, op. cit., p. 230. Importantly, the failure to note the distinction between homosexuality and pedophilia is deplored by the majority of homosexual people who "do not share, do not approve, and fear to be associated with pedophilic interests," D. J. West, Homosexuality, Aldine: Chicago, 1968, p. 119. One recent study summarizes the pertinent empirical literature on sex offenders against children as follows: "these men are much more likely to have a heterosexual history and orientation than a homosexual one. Contrary to public belief, homosexual adult males rarely molest young male children." R. L. Geiser, Hidden Victims: The Sexual Abuse of Children, Beacon Press: Boston, 1979, p. 75.

²⁹ See Wainwright Churchill, Homosexual
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small minority preference,³⁰ in very early childhood, well before laws of this kind have any effect.³¹ If the aim of determining sexual preference by criminal penalty were legitimate, which amici do not concede,³² that interest could not constitutionally be secured by overbroad statutes which coercively violate the core privacy rights of exclusive homosex-

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Behavior Among Males, Hawthorn: New York, 1967, pp. 283-291; C. Tripp, The Homosexual Matrix, McGraw-Hill: N.Y., 1975, p. 251; D. J. West, Homosexuality, Aldine: Chicago, 1968, p. 266.

³⁰ Kinsey states that four percent of males are exclusively homosexual throughout their lives. Kinsey, et al., op. cit., 1948, pp. 650-651.

³¹ See, for example, J. Money & H. Ehrhardt, Man & Woman Boy & Girl, Johns Hopkins University Press: Baltimore, 1972, at pp. 153-201. One study hypothesizes that gender identity and sexual object choice coincide with the development of language, i.e., from 18 to 24 months of age. See Money, Hampson & Hampson, "An Examination of Some Basic Sexual Concepts: The Evidence of Human Hermaphroditism," 97 Bull. Johns Hopkins Hosp. 301 (1955). Cf. A. P. Bell, M. S. Weinberg, & S. K. Hammersmith, Sexual Preference, Indiana University Press: Bloomington, 1981.

³² See Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Meyer v. Nebraska, 262 U.S. 390 (1923).

uals of all ages and that, in any event, irrationally pursue the state interest.

Other moral principles fail to justify absolute prohibitions on oral and anal sex. Such relations are not, for example, generally violent. Thus, prohibitory statutes could not be justified by moral principles of nonmaleficence. There is no convincing evidence that such sexual acts harm the agent or correspond with any form of mental or physical disease or defect³³ so that paternalistic principles do not here come into proper play. And, these statutes do not correspond to any just purpose the state might have in enforcing principles of fidelity: the acts often occur in ongoing and longstanding intimate relations, which they may, if anything, stabilize and enrich.

³³ See The Wolfenden Report, Stein & Day: New York, 1963, at pp. 31-33; E. Hooker, "The Adjustment of the Male Overt Homosexual," 21 J. of Projective Techniques 18 (1957). Both the American Psychiatric Association and the American Psychological Association no longer regard homosexuality as such as a manifestation of psychological problems. P. Blumstein & P. Schwartz, op. cit., p. 44. For the ways in which criminalization, if anything, fosters health problems in this area, see Note, "The Constitutionality of Laws Forbidding Private Homosexual Conduct," 72 Mich. L. Rev. 1613, 1631-33 (1974).

The failure of these laws to satisfy the constitutional burden required for abridgement of constitutional privacy is consistent with the similar failure implicit in the Court's previous applications of constitutional privacy. Like anti-contraception laws, these laws coerce people not to engage in nonprocreative sex but do so even more unwarrantably since some disabled persons and many homosexual men and women find their exclusive or primary forms of sexual expression in these acts. The interest in autonomy in intimate relations is here at least as strong as that in the reproductive autonomy of abortion decisions or decisions to use obscene materials, and the evidence of harms to the rights of concrete other persons even more controversial and speculative.

III.

RESIDUAL MORAL ARGUMENTS, TRADITIONALLY OFFERED TO JUSTIFY CRIMINALIZATION OF ORAL AND ANAL SEX, REFLECT A HISTORY OF FALSE EMPIRICAL AND DUBIOUS NORMATIVE BELIEFS THAT CAN NO LONGER CONSTITUTIONALLY ENJOY THE FORCE OF LAW.

One final moral argument has been used to justify a general prohibition on oral and anal sex -- the argument invoked by the district

court in Doe as the ultimate ground for the legitimacy of the Virginia sodomy statute, namely, "the promotion of morality and decency," 403 F. Supp. 1202, interpreted as an appeal to traditional moral condemnation of certain acts.

Amici argued in II., supra, that a form of ethical argument is, indeed, necessary to the legitimacy of the criminal law in the United States, but the very elaboration of the constitutional right to privacy consistent with fundamental principles of our constitutional law suggests that not every statement of "morality and decency," which surely could be invoked against all the privacy decisions, is of equal constitutional weight. In fact, all the privacy decisions reflect deep moral controversy within American society over which aspects of our collective moral traditions can and cannot justly be retained. Our moral practices as a community are not inextricably homogeneous: on critical reflection, we retain certain basic principles in them (for example, treating persons as equals), but change lower order conventions which we come to believe inconsistent with the reflective ethical core of our moral and constitutional values. Accordingly, the appeal to "morality

and decency," without more, falsely begs the central issue in dispute, supposing precisely the kind of homogeneity in moral values which the general history of Western ethics and specific history of constitutional privacy belie. It is a valued and admirable distinction of Western ethics and law that they have changed, open to critical reflection on their own history and to new empirical and normative perspectives.

Amici proposed in II., supra, the kind of ethical principles to which controversies over proper criminalization appeal, and explained why the criminalization of acts of sexual expression cannot meet this burden of justification. We propose now to complete that argument by showing that the traditional moral conceptions underlying the criminalization of oral and anal sex reflect a history of false empirical and dubious moral beliefs that cannot, on reflection, constitutionally enjoy the force of law.

The traditional moral condemnation of oral and anal sex in our culture may be traced to a number of beliefs: (1) that homosexual forms of such sexual expression undermine, particularly in men, desirable masculine character traits -- for example, courage and

self-control; (2) a general conception that sexuality has one proper purpose alone (procreation) and any other form of sexual expression, disengaged from procreation, is shamefully wrong (including contraceptive use); (3) an empirical belief that prohibitions of homosexual forms of such sexual expression combatted pestilence, plague, and natural disaster;³⁴ (4) a theological conception that relevant passages in the Old and New Testaments condemned such acts; (5) various empirical beliefs about the inhumanly exceptional choice of sexual propensities, the evil consequences of their exercise to the agent and others (child molestation), their connections with other moral vices, etc.; and (6) a poli-

³⁴ See Justinian, *Novellae* 77 and 141, reprinted in D. Bailey, Homosexuality and the Western Christian Tradition, Longmans, Green & Co.: New York & London, at pp. 73-75. The issuance of these imperial edicts seems to have been prompted by contemporary earthquakes, floods, and plagues, which Justinian, drawing an analogy to the Sodom and Gomorrah episode, supposed to be caused by homosexual practices. *Id.* at pp. 76-77. Blackstone similarly cites the Sodom and Gomorrah episode, in support of the appropriateness of the death penalty for homosexual acts, indeed suggesting -- since God there punished by fire -- the special appropriateness of death by burning. 4 W. Blackstone, Commentaries *216.

tical conception that such acts constitute a form of willful heresy or treason against the stability of social institutions. None of these beliefs can today reasonably sustain the application of coercive sanctions to oral and anal sex as such.

(1) The view that male homosexuality necessarily involves the loss of desirable character traits³⁵ is without empirical foundation: in general, apart from sexual preference, exclusive homosexuals are indistinguishable from the general population.³⁶ If the traditional view rests on the idea that sexual relations between males involve the degradation of one or both parties to the status of a woman,³⁷ the view expresses intellectual confusion (sexual preference and gender iden-

³⁵ For the earliest literate statement of this view, see Plato, Laws, Book VIII, 835d-842a.

³⁶ See A. Bell & M. Weinberg, Homosexualities, at pp. 195-231; W. Churchill, Homosexual Behavior Among Males, pp. 36-59.

³⁷ In the ancient world, for example, while homosexuality as such was not wrong, to allow oneself to be the passive partner (the woman) was wrong. See T. Vanggaard, Phallos, International Universities Press: New York, 1972.

tity are not correlated)³⁸ and the unacceptable moral premise that the status of a woman is a degradation, something repugnant both to contemporary constitutional law and ethics.³⁹

(2) The general conception that sexuality has one exclusively legitimate function (procreation)⁴⁰ is one almost certainly based

³⁸ See, e.g., W. Simon & J. H. Gagnon, "Femininity in the Lesbian Community," in E. Goode & R. Troiden, eds., Sexual Deviance and Sexual Deviants, Morrow, New York, 1974, at pp. 256-67.

³⁹ See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973); J. S. Mill, The Subjection of Women, MIT Press: Cambridge, Mass., 1970.

⁴⁰ The classic statement of this view is Augustine, The City of God, H. Bettenson trans. Penguin: Harmondsworth, 1972, at pp. 577-94. St. Thomas is in accord with Augustine's view. Of the emission of semen apart from procreation in marriage, he wrote: "[A]fter the sin of homicide whereby a human nature already in existence is destroyed, this type of sin appears to take next place, for by it the generation of human nature is precluded." T. Aquinas, On the Truth of the Catholic Faith: Summa Contra Gentiles, pt. 2, ch. 122(9), V. Bourke trans. Image: New York, 1956, at p. 146. See, in general, John T. Noonan, Jr., Contraception: A History of Its Treatment by the Catholic Theologians and Canonists, Harvard University Press: Cambridge, Mass., 1966; Vern Bullough, Sexual Variance in Society and History, University of Chicago Press: Chicago, 1980.

on a misunderstanding of the unique features of human sexuality, its expression of higher cortical functions of imagination and bonding and its independence of the reproductive cycle.⁴¹ For humans, sexual relations are intrinsically valuable in the expression of love and bonding and the forms of intimate relations and personal lives they make possible.⁴² The insistence that sex must be procreational appears, from the perspective of individuals, to be a moral degradation and denial of valuable capacities of human nature, and, from the viewpoint of society, most unwise in a period of increasing concern with population control. Both these considerations justify the Court's rejection of anti-contraception laws and apply as well to nonprocreational sex acts as such.⁴³

⁴¹ See C. Ford & F. Beach, Patterns of Sexual Behavior, at pp. 199-267; H. S. Kaplan, op. cit.

⁴² See I. Eibl-Eibesfeldt, Love and Hate, G. Strachan trans. Holt, Rinehart & Winston: New York, 1972, at pp. 155-169; W. Masters & V. Johnson, The Pleasure Bond, Little, Brown: Boston, 1975.

⁴³ Certainly, the crude argument that if everyone were homosexual there would, disastrously, be an end of the human species,
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(3) Empirical beliefs about the causal connection of oral and anal sex to natural disasters are, of course, without foundation, and would not be worthy of mention were they not cited by influential Western legal authorities as the reason for condemning homosexuality as a capital offense, preferably by burning.⁴⁴

(4) Many of the interpretations of the Bible, to the effect that homosexual relations are condemned, are almost certainly erroneous.⁴⁵ Other forms of moral argument to the

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universalizes absurdly a principle no one seriously proposes: namely, that everyone should or must be homosexual, as if, contrary to all modern sex research, sexual preference is or could be chosen.

⁴⁴ See note 34, supra.

⁴⁵ For example, the Sodom and Gomorrah episode, Genesis 19, is apparently not about homosexuality at all, but hospitality. See D. Bailey, op. cit., pp. 1-28; J. McNeill, The Church and the Homosexual, Sheed, Andrews & McMeel: Kansas City, 1976, at pp. 42-50; J. Boswell, Christianity, Social Tolerance, and Homosexuality, University of Chicago Press: Chicago, 1980, pp. 91-105. Yet, American courts cite this episode in support of the legitimacy of anti-sodomy laws, Dawson v. Vance, 329 F. Supp. 1320, 1322 (S.D. Tex. 1972). - See Doe v. Commonwealth's Attorney,
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same effect, by prominent theologians,⁴⁶ clearly reflect forms of beliefs (1) and (2), which were absorbed from the surrounding culture and read into Western theology. Indeed, critical reflection on these beliefs has led many religious people to question their continuing religious authority.⁴⁷ Certainly, if these beliefs cannot sustain reflective scrutiny, their religious origins cannot confer on them constitutional legitimacy; indeed, a powerful argument could be made to quite the opposite effect.⁴⁸

(5) Traditional conceptions of the willful, mysteriously anomalous, inhumanly exceptional, and harmful nature of homosexual preference to the agent and others cannot

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403 F. Supp. 1199 (E.D. Va. 1975), aff'd without opinion, 425 U.S. 901 (1976), which points out that sodomy statutes have an "ancestry going back to Judaic and Christian law," id. at 1202.

⁴⁶ See Augustine, op. cit., and Thomas Aquinas, op. cit.

⁴⁷ See works of D. Bailey, J. McNeill, and J. Boswell, op. cit.

⁴⁸ Louis Henkin, "Morals and the Constitution: The Sin of Obscentiy," 63 Colum. L. Rev. 391 (1961).

withstand empirical examination today. Homosexual preference appears to be an adaptation of natural human propensities to very early social circumstances of certain kinds, so that the preference is settled, largely irreversibly, at a quite early age.⁴⁹ The sexual acts which express this preference for homosexuals are a natural expression of human sexual competences and sensitivities, and do not reflect any form of damage, decline, or injury to self.⁵⁰ For homosexuals, these acts are at the core of intimate relationships as central to their integrity as comparable intimate relationships of others.⁵¹ Aside from sexual preference, homosexuals are indistinguishable from the rest of the population, being no more likely to have sex with the underage than other groups.⁵²

(6) The conception that homosexual forms of oral and anal sex are a form of heresy or treason is both an ancient and modern ground

⁴⁹ See references at note 31, supra.

⁵⁰ See references at note 33, supra.

⁵¹ See P. Blumstein & P. Schwartz, op. cit., pp. 44-45.

⁵² See references at note 28 and note 36, supra.

offered for its criminal condemnation.⁵³ But, there is no good reason to believe that the legitimacy of such forms of sexual expression destabilizes social cooperation. Homosexual relations are and will foreseeably remain the preference of small minorities of the population,⁵⁴ who are as committed to

⁵³ Throughout the Middle Ages, homosexuals were prosecuted as heretics, often being burned at the stake. See D. Bailey, op. cit., p. 135. Thus, "buggery," one of the names for homosexual acts, derives from a corruption of the name of one heretical group alleged to engage in homosexual practices. See Bailey, id., at pp. 141, 148-49. For a modern use of the idea of treason in this context, see P. Devlin, The Enforcement of Morals, Oxford University Press: London, 1965, at pp. 1-25. For rebuttal, see H. L. A. Hart, Law, Liberty, and Morality, Stanford University Press: Stanford, 1963; also, "Social Solidarity and the Enforcement of Morals," 35 U. Chi. L. Rev., 1 (1967).

⁵⁴ The original Kinsey estimate that about 4 percent of males are exclusively homosexual throughout their lives is confirmed by comparable European studies. See Paul H. Gebhard, "Incidence of Overt Homosexuality in the United States and Western Europe," J. M. Livingood, ed., National Institute of Mental Health Task Force on Homosexuality, U.S. Government Printing Office: Washington, D.C., 1972, at pp. 22-29. The incidence figure remains stable though many of the European countries do not apply the criminal penalty to

(footnote continued)

principles of social cooperation and contribution as any other group in society at large. Indeed, the very accusation of heresy or treason brings out an important feature of the traditional moral condemnation in its contemporary vestments: it rests no longer on generally acceptable arguments of protection of the rights of persons to neutral goods, but appeals to arguments internal to highly personal, often almost religious decisions about acceptable ways of belief and life style. When a moral tradition in this way abandons certain of its essential grounds, it may justly retain its legitimacy for those internal to the tradition, all the more so because it remains more exclusively constitutive of their tradition. But, if those essential grounds are constitutionally necessary for the tradition coercively to enforce its mandates through the criminal law, the abandonment of those grounds, must, pari passu, deprive the tradition of its constitutional legitimacy as a ground for coercive sanctions. For the

(footnote continued from previous page)
 consensual adult sex acts of the kind here under discussion. See W. Barnett, Sexual Freedom and the Constitution, University of New Mexico Press: Albuquerque, 1973, at p. 293.

tradition now no longer expresses ethical arguments which may fairly be imposed on all persons, but rather perspectives reasonably authoritative only for those internal to the tradition. Enforcement of such perspectives would be, amici submit, the functional equivalent of a heresy prosecution⁵⁵: the grounds for prohibition are highly personal ideological or political disagreements among which free persons reasonably disagree; and the continuing force of the prohibitions rests, on examination, not on protection of the rights of persons, but on fears and misunderstandings directed at the alien way of life of a small and traditionally condemned minority, as if, at bottom, the legitimacy of one's own way of life requires the illegitimacy of all others. Constitutional toleration, that forbids heresy prosecutions⁵⁶ and sharply circumscribes

⁵⁵ The English legal scholar, Tony Honore, observed of the contemporary status of the homosexual: "It is not primarily a matter of breaking rules but of dissenting attitudes. It resembles political or religious dissent, being an atheist in Catholic Ireland or a dissident in Soviet Russia." Tony Honore, Sex Law, Duckworth: London, 1978, at p. 89.

⁵⁶ "Heresy trials are foreign to our Constitution," United States v. Ballard, 322 U.S. 78, (footnote continued)

treason prosecutions⁵⁷, must likewise be extended to criminal prohibitions which today have the political force of heresy and treason prosecutions.

IV.

THE CRIMINALIZATION OF SEXUAL EXPRESSION
NOT ONLY FAILS TO SATISFY ITS CONSTITUTIONAL
BURDEN OF JUSTIFICATION AND RESTS ON ERRONEOUS
BELIEFS, BUT INFLICTS GRIEVOUS HARM ON
PERSONS.

Amici submit that the arguments here made make possible for us as a legal culture the coherent elaboration of continuous constitutional traditions consistent with contemporary empirical and normative insight. For example, the deep commitment of the Founders to the abstract background right of voluntary association should now reasonably be extended to forms of intimate association which can no longer be supposed beyond the purview of ethics. Indeed, amici believe that laws criminalizing such intimate associations brutally and unethically work grievous harm in

(footnote continued from previous page)
86 (1944) (Douglas, J., writing for the Court).

⁵⁷ See U.S. Const., Article III, Sec. 3.

areas of personal intimacy at the core of the ethical self-respect which the right to constitutional privacy justly protects: health professionals are legally restricted from assisting people to responsible sexual fulfillment, and the force of criminal law callously bears upon intimate sensitivities at the core of relationships and aspirations that give meaning to life itself.

Consider the effect of these laws on the lives of disabled people and exclusively homosexual men and women: their cumulative effect is to deny disabled people and practicing homosexuals the experience of a secure self-respect in building personal relationships. The degree of emotional sacrifice thus exacted for no defensible reason seems among the most unjust deprivations that law can compel. Persons are deprived of a realistic basis for confidence and security in their most basic emotional propensities. Criminal penalties reinforce employment risks and social prejudice, which fragment emotions, physical expression, and self-image in a cruelly gratuitous way. The deepest damage is to the spiritual and imaginative dimension that gives human sexual love its extraordinary significance in a life well lived. Persons

surrounded by false social stereotypes that are supported by law find it difficult to esteem their own emotional propensities, their natural expression, or their objects. Without such self-esteem, love finds only with difficulty a meaningful and enduring object. In thus forbidding sexually disabled persons and exclusive homosexuals the option to express sexual love in the only ways they often find natural, the law deprives them of nothing less than love, an essential good of our socially companionate species. Amici regard this as a grievous harm to the spiritual lives of the good and innocent persons who deserve more of their constitutional traditions than such unjust contempt. We submit that our law affords a remedy for this wrong, and ask this Court to give it.

CONCLUSION

Since, for reasons stated above, the constitutional right to privacy encompasses acts of intimate sexual expression, solicitation laws, which non-neutrally regulate access

to such a right, cannot be sustained. Accordingly, the judgment of the New York Court of Appeals should be affirmed.

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OTION FILED
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1724

THE STATE OF NEW YORK,

Petitioner,

—v.—

ROBERT UPLINGER and SUSAN BUTLER,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

Motion for leave to file brief Amici Curiae and
**BRIEF OF THE AMERICAN CIVIL LIBERTIES
UNION AND THE NEW YORK CIVIL
LIBERTIES UNION, AMICI CURIAE**

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MOTION OF THE AMERICAN CIVIL LIBERTIES UNION
AND THE NEW YORK CIVIL LIBERTIES UNION FOR
LEAVE TO FILE BRIEF AS AMICI CURIAE.

The American Civil Liberties Union (ACLU) and the New York Civil Liberties Union (NYCLU) move for leave to file the attached brief as amici curiae. The petitioner has refused to consent to the filing of this brief.

The ACLU is a nationwide, non-profit, non-partisan organization of over 250,000 members dedicated to defending the principles embodied in the Bill of Rights. The NYCLU is one of its statewide affiliates.

This case raises important issues of longstanding concern to both the ACLU and the NYLCU. First, it involves a loitering statute that is so vague in its proscriptions and so overbroad in its reach that it

inevitably intrudes on First Amendment freedoms. On many occasions, amici have participated in similar challenges to such loitering statutes before this Court.

In addition, the facts and circumstances of respondent Uplinger's arrest highlight the manner in which this particular loitering statute has been utilized in a discriminatory manner against homosexuals in New York.

Amici have long opposed discrimination against homosexuals in any form, including statutes like this one that make it a crime to discuss private sexual activity with another consenting adult in a discreet manner.

For both of these reasons, the NYCLU submitted an amicus brief to the New York Court of Appeals in support of respondents. Our interest in this Court remains the same. To present their views in this important First Amendment case, the ACLU and

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INTEREST OF AMICI

The interest of amici curiae is set forth in the motion attached to this brief.

STATEMENT OF FACTS

Amici adopt and incorporate by reference the statement of facts contained in respondents' briefs.

INTRODUCTION AND SUMMARY OF ARGUMENT

In overturning respondents' convictions below, the New York Court of Appeals characterized the loitering law at issue here as a "companion statute," 58 N.Y.2d 937, 938 (1983), to the consensual sodomy law struck down three years before on privacy grounds in People v. Onofre, 51 N.Y.2d 476 (1980), cert. denied, 451 U.S. 987 (1981). Because of that reference, this case has been treated by some as an opportunity to address the underlying question raised by Onofre and never resolved

by this Court.

The question of whether homosexuals in America are entitled to constitutional protection in their private sexual affairs is undoubtedly a significant one. For nearly two decades, however, this Court has steadfastly upheld the right of individual autonomy in private sexual matters. E.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 478 (1972). Should this Court feel compelled to reach the privacy issue here, the principles enunciated in this Court's prior decisions require affirmance of the decision below. Indeed, if anything, the stigma still attached to being a homosexual in this country only magnifies the need for constitutional protection against official persecution. See generally, Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, 30 Hastings L.J. 799 (1979). Cf.

NAACP v Alabama, 357 U.S. 449 (1958).

Moreover, it is clear that the state may not frustrate the exercise of fundamental rights by denying access to the means or individuals necessary to implement those rights. Bigelow v. Virginia, 421 U.S. 809 (1975).

While supporting a broad view of the constitutional right of privacy, amici nevertheless believe that the privacy issue need not be reached in this case. Under traditional First Amendment analysis, the loitering statute now before this Court cannot be sustained.

This Court, of course, has often reviewed the constitutionality of loitering statutes and has repeatedly noted the chilling effect of vaguely worded laws on First Amendment rights. E.g., Papachristou v. City of Jacksonville, 405 U.S. 156 (1971). In this case, New York has purported to penalize loitering in a public place "for

the purpose of . . . soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature." New York Penal Law §240.35(3). The state, however, has failed to define the critical element of solicitation and, more particularly, has failed to include in the statute any requirement of an overt act. Accordingly, the statute is prone to the vagaries of arbitrary enforcement that this Court has often condemned. In addition, it lacks the requisite notice that due process demands of a criminal law. Not surprisingly, therefore, two state courts have struck down virtually identical statutes on vagueness grounds. People v. Gibson, 184 Colo. 444, 521 P.2d 774 (1974); Gates v. Municipal Court of Santa Clara County, 135 Cal.App.3d 309, 185 Cal.Rptr. 330 (1982). The New York law is thus unconstitutional on its face.

It is also unconstitutional as applied in the context of this case. At the time respondents were arrested, Onofre had already invalidated New York's consensual sodomy law. There is no evidence in the record that either respondent was guilty of annoying or harassing behavior; indeed, neither respondent was even charged with harassment. Rather, respondents were arrested for inviting another to engage in conduct that New York's highest court had declared to be constitutionally protected. Under the circumstances, respondents' speech was entitled to the plenary protection of the First Amendment. None of the asserted justifications offered by the state are sufficient to override respondents' First Amendment rights.

ARGUMENT

I. NEW YORK'S LOITERING STATUTE IS UNCONSTITUTIONALLY VAGUE

This Court has often stressed the importance of specificity in loitering and vagrancy laws. See Kolender v. Lawson, 103 S.Ct. 1855 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156 (1971); Coates v. Cincinnati, 402 U.S. 611 (1971); Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965). Because the loitering statute at issue in this case lacks the specificity required by this Court's prior decisions, it is facially invalid and must be struck down.¹

1. Even assuming, arguendo, that the solicitations in this case could be validly proscribed under a clearly and narrowly drawn prohibition of sexual solicitations, respondents may nevertheless challenge the facial constitutionality of §240.35(3) on vagueness grounds. This Court has recently reaffirmed the principle that vagueness challenges will be permitted where a criminal statute reaches a substantial amount of constitutionally protected conduct, particularly when First Amendment liberties are implicated. See Kolender v. Lawson, 103 S.Ct. 1855 at 1859 n.8; see also Hoffman (Footnote cont'd.)

Respondents were arrested for having "loitered in a public place" with an allegedly evil intent -- the intent of soliciting another person to engage in "deviate sexual intercourse or other sexual behavior of a deviate nature." The concept of "solicitation" is thus at the heart of the statute. Nowhere in the statute, however, is the term "solicitation" defined. This central ambiguity alone renders the statute unconstitutionally vague.

It can hardly be claimed that the term "solicitation" is self-defining. Depending upon circumstances and the idiosyncratic understanding of the individuals involved, a wide range of comments and behavior could easily be regarded as an impermissible solicitation, including a friendly smile, a wink, a suggestive glance or an invitation

(Footnote cont'd.)

Estates v. Flipside, 455 U.S. 489, 495 n.7 (1982).

back to one's apartment without express reference to sex. Since any homosexual act might be considered "sexual behavior of a deviate nature," any gesture or remark to an individual of the same sex that might be construed in a criminal trial as referring to sex is theoretically proscribed.

"[A] statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ so as to its application violates the first essential of due process." Connally v. General Construction Co., 269 U.S. 385, 391 (1926). Moreover, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). This is especially true where a statute "abut[s] upon sensitive areas of basic First Amendment freedoms,"

Baggett v. Bullitt, 377 U.S. 360, 372 (1964), and, as in the case of respondent Uplinger, permits an arrest to be triggered by the specific words spoken.

The failure to define the term "solicitation" creates the most significant ambiguity in the law, but not the only one. In addition, the law fails to define the "public" places in which "solicitations" are proscribed. The state suggests in its brief that the reach of the statute is limited to publicly-owned property. Petitioner's Brief at 16, 21, 23. But the predecessor to §240.35(3) was applied even to activity in a homosexual bar. See People v. Pleasant, 23 Misc.2d 367, 122 N.Y.S.2d 141 (City Ct. N.Y.C. 1953). Thus, a person seeking "to steer between lawful and unlawful conduct," Grayned v. City of Rockford, 408 U.S. at 108, is at a loss to know what he may say without engaging in "solicitation" and where he may

say it without violating the law.

Similarly, there is no indication in the statute of what constitutes "other sexual behavior of a deviate nature." Recognizing this infirmity, the state defines the phrase in its brief as embracing conduct which is "sexual[ly] abnormal" or "given to significant departures from the behavioral norms of society." Petitioner's Brief at 11, 30. These definitions, even assuming they are consistent with what the Legislature had in mind, only compound the vagueness problem. To interpret the statute, one "must gauge the temper of the community, and predict at his peril the moral and sexual attitudes of those who will be called to serve on the jury." Pryor v. Municipal Court for Los Angeles, 25 Cal.3d 238, 252, 599 P.2d 636, 644 (1979) (invalidating law prohibiting solicitation of lewd or dissolute acts). See also Jellum v. Cupp, 475 F.2d 829 (9th Cir.

1973).

The unconstitutional vagueness of New York's loitering statute is plainly illustrated by comparing it to analogous provisions in the loitering and solicitation statutes of other states. In contrast to New York's approach of prohibiting loitering for an unlawful purpose, the majority of similar state statutes require an overt act to establish solicitation.² Significantly, the

2. See, e.g., Ariz. Rev. Stat. Ann. §13-2905(A)(1) (1978); Ga. Code Ann. §16-6-15(1982); Md. Code Ann. art. 27, §15(e) (1982); Mich. Stat. Ann §750.448(1968); Miss. Code §97-35-3(b) (1972); Nev. Rev. Stat. §207.030(a) (1981); N.D. Cent. Code §12.1-31-01(6) (1976); Ohio Rev. Code Ann. §2907.07(B) (1982); Okla. Stat. tit. 21, §1029(b) (1982); Or. Rev. Stat. §163.455(1971); Wisc. Stat. Ann. §947-02(3) (1982). See also D.C. Code Ann. §22-1112(a) (1981). Only five states have statutes that, like New York's, require no overt act of any kind. See Ala. Code §13A-11-9(1982); Ark. Crim. Code §41-2914(1)(e) (1977); Del. Code Ann. tit. 11, §1321(5) (1979); Kan. Stat. Ann. §21-4108(d) (1981); S.C. Code §16-15-90(5) (1976). See also Colo. Rev. Stat. §18-9-112, invalidated on account of its failure to require an overt act in People v. Gibson, 184 Colo. 444, 521 P.2d 774 (1974).

predecessor to New York's loitering statute required an act of solicitation as an element of the loitering offense.³ There is no explanation in the legislative history for why that requirement was subsequently deleted.

Obviously, if the loitering statute once contained an overt act requirement, "further precision in the statutory language is "[n]either impossible nor impractical." Kolender v. Lawson, 103 S.Ct. at 1860. New York's statutory prohibition against loitering for the purpose of engaging in prostitution, for example, offers specific illustrations of the conduct it proscribes. See New York Penal Law §240.37(2). Thus, the repeated "beckoning" of persons or cars creates an inference of loitering for the

3. See former New York Penal Code, §722(8). The statute is cited in People v Burnes, 178 N.Y.S.2d 746, 749 (N.Y.C. App. 1958).

purpose of prostitution under the statute.

Id. Whether that inference is justified or not is less important for present purposes than the fact that it is clearly spelled out in the language of the law. Such objective standards are totally absent from the loitering statute at issue in this case.

The question of whether a loitering statute, like New York's, can be upheld without the requirement of an overt act has been addressed by only two other courts, and both courts have struck down similar laws as unconstitutional. In People v. Gibson, 184 Colo. 444, 521 P.2d 774 (1974), the Colorado Supreme Court held that its state's loitering statute violated due process requirements. Like this case, Gibson involved a challenge to a statute prohibiting loitering "for the purpose of engaging or soliciting another person to engage in . . . deviate sexual intercourse." Colo. Rev. Stat. §18-9-

112(2)(c). The court held that the legislature's failure to require any overt conduct in addition to the loitering rendered the statute unconstitutional. Like the court below, the Colorado Supreme Court declined to read an overt act requirement into the statute in order to save it from constitutional invalidity.

The Gibson court articulated two reasons for its refusal to impose an overt act requirement on Colorado's loitering statute: a reluctance to usurp the legislative function, and a desire to avoid the inconsistency of prohibiting loitering for the purpose of engaging in conduct that was legally protected in Colorado, as in New York. 184 Colo. at 446-47. The approach of the court below is fully consistent with each of these rationales.⁴ Indeed, imputing an

4. Although the Erie County Court interpreted §240.35(3) to require "an overt act or other conduct unambiguously evidencing (Footnote cont'd.)

overt act requirement in the instant case would have been at odds with the apparent legislative intent underlying the present wording of the statute. Since §240.35(3) was drafted to eliminate the overt solicitation requirement of its predecessor, the New York Court of Appeals would have effectively repealed this legislative revision had it imposed the requirement of an overt act by judicial interpretation. As the Court of Appeals also recognized, however, §240.35(3) is unconstitutional in its present version.

Likewise, in Gates v. Municipal Court of Santa Clara County, 135 Cal.App.3d 309, 185 Cal.Rptr. 330 (1982), the court concluded

(Footnote cont'd.)

the proscribed purpose," People v. Uplinger, 113 Misc. 2d 876, 880, 449 N.Y.S.2d 916, 920-21, (Erie Cty. Ct. 1983), this interpretation was not adopted by the New York Court of Appeals in its reversal of the Erie County Court's decision. This Court is, of course, bound by the construction of the statute adopted by the New York Court of Appeals. Mullaney v. Wilbur, 421 U.S. 684 (1975).

that an ordinance prohibiting loitering "for the purpose of soliciting an act of prostitution or lewdness, if such person is a known panderer or prostitute" was unconstitutionally vague. The court emphasized that other than the single reference to status, itself problematic, the ordinance afforded complete discretion to law enforcement officials "whose subjective judgment alone would determine whether sufficient 'intent' accompanies the act of 'loitering' or 'remaining' in a public place." 135 Cal.App.3d at 320. Under well-settled doctrine, the court then decided that this virtual absence of any objective standard to guide law enforcement rendered the ordinance impermissibly vague. Id.

The absence of specifically defined conduct as an element of New York's loitering statute creates precisely the same problem and, for the same reasons, makes arbitrary

enforcement of §240.35(3) almost inevitable. Determining when a person loiters with a particular purpose is an exercise in psychological guesswork. Because of the statute's lack of any objective and clearly defined standards, those charged with its enforcement are left to apply the law based on their individual predilections and subjective determinations. This absence of clear and specific standards is even more problematic in view of the discreet, ambiguous nature of the typical homosexual solicitation.⁵ New York's complete reliance

5. See e.g., Bell, Public Manifestations of Personal Morality: Limitations on the Use of Solicitation Statutes to Control Homosexual Cruising, in Homosexuality and the Law, at 107 (D. Knutsen ed. 1980) (homosexual solicitation is typically cautious, unobtrusive and equivocal); Note, There May Be Harm in Asking: Homosexual Solicitations and the Fighting Words Doctrine, 30 Case W. Res. L. Rev. 461, 490 (1979) (homosexual solicitation is clandestine, discreet and circumspect); see generally Project, The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County, 13 U.C.L.A. L. Rev. 643, 698-99 nn.81-84 (1966).

on the discretion of law enforcement officials in applying the statute is precisely what the vagueness doctrine forbids. See Kolender v. Lawson, 103 S.Ct. at 1860; Papachristou v. City of Jacksonville, 405 U.S. at 170.

Furthermore, the broad and ambiguous proscriptions of §240.35(3) risk suppressing a substantial degree of legitimate expression. Because the statute fails to specify what types of verbal expression or nonverbal behavior are prohibited, it is susceptible to applications far beyond its legitimate or intended scope. Solicitations of non-deviate, non-commercial sexual activity, although beyond the literal scope of the statute, are surely inhibited by the statute's ambiguous provisions. Solicitations of a completely non-sexual nature -- invitations to one's home,

invitations to go out to dinner, to a bar, or to any other social occasion -- are also forms of expression that may be prohibited if it is later determined by some finder of fact that such expressions evince the statute's forbidden purpose. Even conversations bereft of any invitation are subject to criminalization under the statute if a police officer reads a forbidden intent into what might otherwise be an innocuous discussion.

The statute's inherently ambiguous provisions also pose the risk of infringing rights of association and assembly. This Court simply cannot ignore the fact that this statute is most often applied against homosexuals. As in Coates v. Cincinnati, 402 U.S. 611, 616 (1971), the broad language of §240.35(3) unfortunately invites discriminatory enforcement against a class of individuals whose association together may be deemed annoying for no other reason than that

"their ideas, their lifestyle, or their physical appearance is resented by a majority of their fellow citizens." Given that potential of discriminatory enforcement against a disfavored group, the necessity of precision in the statutory language is even more paramount.

In failing to predicate enforcement of §240.35(3) on clearly defined acts that can be objectively determined both by those applying the statute and those within its reach, New York has "violate[d] the first essential of due process." Connally v. General Construction Co., 269 U.S. at 391. Its loitering statute must therefore be struck down, on its face, as unconstitutional⁶.

6. Assuming the statute is held to be unconstitutional on its face, the convictions of both respondents Uplinger and Butler must be reversed.

II. NEW YORK'S LOITERING STATUTE IS
UNCONSTITUTIONAL AS APPLIED TO
THE FACTS OF THIS CASE

Since 1980, the law of New York has afforded constitutional protection to the private consensual acts solicited by respondents in this case. People v. Onofre, 51 N.Y.2d. 476, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981). Regardless of whether the conclusion in Onofre is held by this Court to constitute a correct exposition of federal law at some future date, it was in fact the controlling law in New York at the time of respondent's arrest and conviction. Thus §240.35(3) must be construed in the instant case solely as a prohibition of loitering for the purpose of soliciting others to engage in legal conduct. Indeed, even petitioner characterizes respondent Uplinger's speech as a solicitation to engage in constitutionally protected activity. Petitioner's Brief at 2, 12.

Respondents' solicitation is therefore entitled to protection under the First Amendment and can only be overridden by a compelling state interest. See Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976). None of the interests asserted by petitioner is sufficient to satisfy that constitutional test. Accordingly, the application of §240.35(3) to the facts of this case can not be sustained regardless of whether or not the statute is facially valid.

Over the past forty years, this Court has repeatedly struck down efforts by the State to prohibit one individual from soliciting another to engage in constitutionally protected activity. See Thomas v. Collins, 323 U.S. 516 (1945); Martin v. Struthers, 319 U.S. 141 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Cantwell v. Connecticut, 310 U.S. 296

(1940). Moreover, the governmental interests most often asserted in those cases without success are precisely the same interests asserted by petitioner here: privacy, a generalized fear of harassment, and an ill-defined sense that the solicitations involved would be offensive to many in the community.

Reflecting that tradition, courts around the country in recent years have consistently invalidated statutes like §240.35(3) that criminalize solicitation to engage in lawful conduct under the rubric of a loitering law. See State v. Tusek, 52 Or. App. 997, 630 P.2d 892 (1981); City of Columbus v. Scott, 47 Ohio App.2d 287, 385 N.E.2d 858 (1975). See also People v. Gibson, supra (recognizing inconsistency of prohibiting solicitation of non-criminal sexual activity); Cherry v. State, 18 Md.App. 252, 306 A.2d 634 (1973) (noting with approval cases holding that solicitation to commit

legal sexual act is protected speech). Other courts have avoided the constitutional dilemma by narrowly interpreting their loitering laws to prohibit only the solicitation of criminal conduct. See Commonwealth v. Sefranka, 382 Mass. 108, 414 N.E.2d 602 (1980); Pryor v. Municipal Court for Los Angeles, supra; Pederson v. City of Richmond, 219 Va. 1061, 254 S.E.2d 95 (1979) (noting that "it would be illogical and untenable to make solicitation of a non-criminal act a criminal offense"). All of these cases represent a steadfast refusal to permit legislative proscription of forms of expression whose object is to engage in legally protected conduct.

In order validly to prohibit forms of expression protected by the First Amendment, petitioner must demonstrate legitimate and compelling governmental objectives which are furthered by a narrowly tailored statutory

proscription. See Shelton v. Tucker 364 U.S. 479 (1960). Petitioner has expressly refused to assert an interest in prohibiting consensual sodomy as a basis for upholding New York's loitering statute. See Petitioner's Brief at 2, 12. Instead, four justifications have been offered by petitioner in support of its abridgement of respondents' protected speech. According to petitioner, §240.35(3) is a harassment statute which seeks to prohibit offensive and annoying behavior; it is designed to prevent an affront to moral and esthetic sensibilities and preserve the residential character of neighborhoods; it seeks to protect against harm to minors; and it seeks to protect the privacy interests of citizens in public places. See id. at 15-22. None of these justifications can withstand constitutional scrutiny.

First, New York's loitering statute is

neither limited nor designed to prohibit offensive or annoying behavior and thus cannot be characterized as a harassment statute. The statute on its face and as authoritatively construed contains no requirement of offense or annoyance; rather, other statutes have been designed specifically for the purpose of prohibiting offensive or annoying conduct. See N.Y. Penal Law §240.20 (McKinney 1980) (prohibiting disorderly conduct), §240.25 (prohibiting harassment). In fact, the New York Court of Appeals specifically refused in this case to categorize §240.35(3) as a harassment statute. 58 N.Y.2d at 938. Cf. Pryor v. Municipal Court of Los Angeles, 25 Cal.3d at 256 (interpreting solicitation statute to require offensiveness). This refusal to narrow the scope of §240.35(3) is consistent with the legislative history of the statute, which demonstrates a desire not

to punish offensive or annoying speech, but rather to proscribe "unsalutary or unwholesome" forms of expression. See Report of the New York State Commission on Revision of the Penal Law and Criminal Code, 1964 Leg. Doc., 187th Sess., No. 14 (hereinafter Legislative Report). In short, whether or not New York may validly prohibit forms of expression which are annoying or offensive to others, the language, legislative history and judicial interpretation of New York's loitering statute convincingly demonstrate that §240.35(3) is simply not such a prohibition.

Furthermore, application of such a statutory requirement would be inappropriate in the instant case. There is no evidence that respondent Uplinger's solicitation was either offensive or annoying to anyone. Rather, the record demonstrates that his solicitation was discreet and unobtrusive,

delivered late at night with no passerby in the vicinity. The solicitation was made only after respondent had quite reasonably concluded that it would be favorably received by Officer Nicosia, who was present for the very purpose of being solicited. At no time did respondent make any physical contact or other threatening remarks or gestures; nor was his behavior unruly, oppressive or intimidating in any way. Given these circumstances, respondent's solicitation simply cannot be described as offensive or annoying.

Second, the sexual nature of respondent Uplinger's speech does not alter the invalidity of its prohibition. Several courts have held that sexual solicitations are constitutionally protected from prohibition in spite of their allegedly unpopular, distasteful or provocative nature. See State v. Tusek, 52 Or. App. at

1001-03; Pryor v. Municipal Court for Los Angeles 25 Cal.3d at 252 n.7.⁷ Respondent's solicitation, discreetly delivered in a cautious and unobtrusive manner, is similarly entitled to constitutional protection.

Petitioner's argument that decisions by this Court compel a contrary conclusion mischaracterizes this Court's rulings. Only in narrowly circumscribed circumstances has this Court indicated that sexually explicit forms of expression are subject to a limited degree of regulation. See F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978); Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976); California v. LaRue, 409 U.S. 109 (1972). This Court has never condoned the

7. Commonwealth v. Sefranka, supra, Pederson v. City of Richmond, supra, and District of Columbia v. Garcia, 335 A.2d 217 (D.C. App.), cert. denied, 423 U.S.894 (1975), are not to the contrary. In each of these decisions, the court interpreted the relevant state statute to prohibit only solicitations to engage in illegal conduct. The Uplinger court did not similarly construe §240.35(3).

broad criminal prohibition of sexually-oriented or provocative expression which inheres in New York's loitering statute. To the contrary, this Court has consistently struck down state laws that attempt to prohibit, rather than regulate, such speech in seeking to protect the sensibilities of citizens who may be offended by its content. See Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Cohen v. California; 403 U.S. 15 (1971). See also Papish v. Board of Curators of University of Mississippi, 410 U.S. 667 (1973).

In contrast to narrowly drawn civil regulations which seek to control only when and where in the marketplace of ideas sexually-oriented speech can be expressed, see FCC v. Pacifica Foundation, supra (time regulation of radio broadcast); Young v.

American Mini-Theatres, Inc., supra

(requiring dispersal of adult movie theatres), New York's criminal prohibition of such expression effectively stifles all forms of sexual solicitation.⁸ This far-reaching suppression of even sexually-oriented speech is flatly inconsistent with the First Amendment principles recently enunciated by

8. The New York loitering statute cannot properly be characterized or upheld as a reasonable restriction on the time, place or manner of speech. First, the term "public place" has been expansively interpreted to include not only streets and parks, but also practically every area where social interaction is possible, including semipublic buildings or areas, common areas of private buildings, and a bar. See People v. Nowak, 46 A.D.2d 469, 363 N.Y.S.2d 142 (1975); People v. Pleasant, 23 Misc. 2d 367, 122 N.Y.S.2d 141 (City Ct. N.Y.C. 1953). It is thus disingenuous to characterize §240.35(3) as merely a restriction on the "place" where sexual solicitations may occur. Second, restrictions on the time, place or manner of expression must be unrelated to the suppression of particular speech. See Grayned v. City of Rockford, 408 U.S. at 115, 120. Section 240.35(3) does not purport to accomplish anything but this impermissible goal -- it seeks to prohibit only solicitations of a particular nature.

this Court; even where sexually explicit visual depictions are involved, governmental measures which either suppress or restrict access to speech in a content-biased fashion are constitutionally intolerable. See Young v. American Mini-Theatres, Inc. 427 U.S. at 71 n.35; id at 78-79 (Powell, J., concurring).

The use of the criminal sanction to punish provocative or unpopular speech in traditional public fora also exceeds constitutional limits on the state's power to restrict First Amendment rights. No precedent from this Court supports prohibition of protected communication on the public streets and sidewalks, especially on the ground that the speech is "unsalutary or unwholesome."⁹ See Cantwell v. Connecticut, 310 U.S. 296 (1940); Hague v. C.I.O., 307 U.S. 496 (1939). In seeking to protect the

9. See Legislative Report at 27.

sensibilities of citizens and preserve community standards, New York's criminal proscription of sexual soliciting far exceeds even the broadest permissible scope of governmental regulation of sexually explicit speech.

Third, the state's interest in the welfare of minors in no way supports the constitutionality of §240.35(3). The statute was not designed to eliminate any perceived harmful effects of loitering on minors. Cf. N.Y. Penal Law §263.15 (McKinney 1980). Moreover, petitioner has failed to produce any evidence that loitering or sexual solicitation in fact produces the palpable harm -- sexual exploitation of children -- which this Court has deemed sufficient to support the suppression of sexually explicit visual material. See New York v. Ferber, 102 S.Ct. 3348 (1982). In the absence of such harm, the statute is little more than an

impermissible attempt to use a criminal prohibition to reduce the level of public discourse to that which is suitable for children. See Erznoznik v. City of Jacksonville, 422 U.S. at 212-14; Butler v. Michigan, 352 U.S. 380 (1957). And although a narrowly drawn civil regulation of sexually explicit speech may be employed in certain circumstances to protect the interests of minors, see FCC v. Pacifica Foundation, supra, this Court's First Amendment doctrine would in no way permit a criminal conviction of George Carlin for delivering his provocative monologue on a public street. Respondents' speech, delivered late at night with no minors in the vicinity, is similarly beyond the scope of the state's power to punish.

Fourth, the application of §240.35(3) against discreet solicitations in public places cannot be upheld by merely reciting

the privacy interests of passersby. "The plain, if at times disquieting truth is that in our pluralistic society, we are inescapably captive audiences for many purposes" and invariably exposed to messages that offend our "esthetic, if not political and moral, sensibilities." Erznoznik v. City of Jacksonville, 425 U.S. at 210. Moreover, when an unobtrusive and cautiously delivered form of expression occurs in a public place and is readily and easily avoidable, the privacy interests of passersby are de minimus and can be adequately protected by the simple action of averting one's eyes. See Cohen v. California, 403 U.S. 15, 21 (1971). Here respondent Uplinger's late-night solicitation was discreetly delivered to an apparently willing and responsive audience of one. In such circumstances, the privacy interests of citizens who are not present or exposed to the speech in question are patently

insufficient to justify the statute's substantial burdening of First Amendment rights. See State v. Phipps, 58 Ohio St.2d 271, 389 N.E.2d 1128 (1979) (refusing to uphold ban on sexual solicitation as valid protection of citizens' privacy interests).

The prohibition of respondent Uplinger's pursuit of legally permissible conduct also interfered with his freedom of association and assembly. In Coates v. Cincinnati, supra, this Court held that an ordinance prohibiting sidewalk assemblies of three or more persons conducting themselves in a manner annoying to others violated the rights of free assembly and association. The Court concluded that public animosity or intolerance was an insufficient reason for burdening these rights. Id. at 665; see also Kolender v. Lawson, 103 S. Ct. at 1859.

New York's loitering statute, unlike the ordinance struck down in Coates, fails even

to require that the loiterer offend or annoy others. In fact, the legislative history of §240.35(3) clearly negates petitioner's characterization of the statute as an attempt "to control public order." Petitioner's Brief at 14. See Legislative Report at 26 ("sexual loitering offenses...[do not] normally tend[] to provoke public disorder or a breach of the peace"). No interference with citizens' legitimate rights to use the public streets and sidewalks is alleged to have occurred as a result of respondent's associational activity. On the contrary, respondent's only purpose was discreetly and unobtrusively to seek associations with willing and receptive partners for the purpose of engaging in legally permissible conduct. His actual behavior was entirely consistent with this limited purpose.

It is thus apparent from the record that the statute at issue is both designed and

applied primarily to suppress expressions or associations incident to an unpopular lifestyle, see Coates v. Cincinnati, 402 U.S. at 616, rather than to achieve any legitimate and compelling state objectives. See Legislative Report at 27 (loitering statute prohibits forms of behavior and expression "deemed generally unsalutary or unwholesome from a social viewpoint"). That purpose may not constitutionally be pursued through a loitering statute.

Finally, even assuming that the state's interest in prohibiting loitering and sexual solicitation is legitimate and compelling, petitioner cannot pursue these interests through the application of §240.35(3), since the state's objectives can be more narrowly achieved. See N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960). If petitioner seeks to prohibit solicitations which are offensive,

annoying or even obscene, it can easily rely on other statutes which are designed specifically to achieve this goal. See N.Y. Penal Law §§ 240.20, 240.25 (McKinney 1980). The state's interest in protecting minors can be more directly achieved by prohibiting the solicitation of minors to engage in sexual activity. See, e.g., Wash. Rev. Code Ann. §9A.88.020 (1977). The privacy interests of citizens also can be protected by narrower, constitutionally permissible means, i.e., a prohibition of "fighting words," or a prohibition of unusually loud or disruptive solicitations. See, e.g., N.Y. Penal Law §240.20(2), (3). Section 240.35(3), however, is an impermissibly broad means of achieving these governmental objectives. See Speiser v. Randall, 357 U.S. 513, 525 (1958). As applied to the facts of this case, it unconstitutionally abridges respondents'

First Amendment rights and cannot be sustained.

CONCLUSION

For the reasons stated herein, the decision below should be affirmed.

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No. 82-1724

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

STATE OF NEW YORK,
v. *Petitioner,*
ROBERT UPLINGER and SUSAN BUTLER,
Respondents.

On Writ of Certiorari to the
New York State Court of Appeals

**MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE
AND BRIEF OF AMICI CURIAE
AMERICAN PSYCHOLOGICAL ASSOCIATION,
AMERICAN PSYCHIATRIC ASSOCIATION
AND
AMERICAN PUBLIC HEALTH ASSOCIATION
IN SUPPORT OF RESPONDENTS**

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**ALTERNATIVE STATEMENT
OF QUESTION PRESENTED**

Amici believe that the sole question presented by the facts in *People v. Uplinger* is the following:

May the state criminally punish an individual for engaging in a private conversation, not intended or likely to be overheard by others, in which he solicited another adult to engage, voluntarily and without payment, in private sexual conduct which, though not illegal, has been termed "deviant" by the state, simply because that private conversation occurred in a public place?

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 36.3 of the Rules of this Court, the American Psychological Association, the American Psychiatric Association and the American Public Health Association, hereby move for leave to file the attached brief *amici curiae*.

The reasons supporting the granting of this motion and the issues which *amici* are uniquely qualified to address are set forth in the statement of interest of *amici* and in the attached brief. The brief will be of value to the Court in its deliberations, and will contain material not otherwise presented.

Recently, the American Psychological Association filed *amicus curiae* briefs in this Court in *Youngberg v. Romeo*, 457 U.S. 307 (1982) (the rights of mentally retarded inmates); *Blue Shield v. McCready*, — U.S. —, 102 S.Ct. 2540 (1982) (the standing of an insured patient receiving psychotherapy to sue under the Clayton Act); *Mills v. Rogers*, 457 U.S. 291, — S.Ct. — (1982) (the right of a competent committed mental patient to refuse psychotropic drugs); *Metropolitan Edison Co. v. People Against Nuclear Energy*, — U.S. —, 103 S.Ct. 1556 (1983) (the cognizability of psychological harm under the National Environmental Policy Act); and *City of Akron v. Akron Center for Reproductive Health, Inc.*, — U.S. —, 103 S.Ct. 2481 (1983) (abortion).

The American Psychiatric Association has participated as *amicus curiae* in numerous cases involving mental health issues, including *Barefoot v. Estelle*, — U.S. —, 103 S.Ct. 3383 (1983); *Youngberg v. Romeo*, *supra*; *Estelle v. Smith*, — U.S. —, 101 S.Ct. 1866 (1981); *Parham v. J.R.*, 442 U.S. 584 (1979); *Addington v. Texas*, 441 U.S. 318 (1979); *O'Connor v. Donald-*

son, 442 U.S. 563 (1975); and *United States v. Byers*, No. 78-1451 (D.C. Cir. 1983) (*en banc*).

The American Public Health Association has filed *amicus curiae* briefs in many cases involving public health issues, including *City of Akron v. Akron Center for Reproductive Health*, *supra*, a recent case involving abortion. The APHA has also filed briefs *amicus curiae* in product safety cases involving the drug Oraflex, warning labels on aspirin, and enforcement of the Food and Drug Administration drug efficacy requirements; and environmental cases, including cases concerning the regulation of formaldehyde and benzene.

Respondents have consented to the filing of this brief, and their letters are being filed with the clerk of this Court. Consent was requested of petitioner, but has been denied. *Amici* respectfully submit that they have important, relevant expertise and information to contribute to the Court for its consideration in deciding these cases.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1724

STATE OF NEW YORK,

v.

Petitioner,

ROBERT UPLINGER and SUSAN BUTLER,

Respondents.

On Writ of Certiorari to the
New York State Court of Appeals

**BRIEF OF *AMICI CURIAE*
AMERICAN PSYCHOLOGICAL ASSOCIATION,
AMERICAN PSYCHIATRIC ASSOCIATION
AND
AMERICAN PUBLIC HEALTH ASSOCIATION
IN SUPPORT OF RESPONDENTS**

INTEREST OF *AMICI*

The American Psychological Association (hereafter "Psychological Association"), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. The Psychological Association has more than 55,000 members and includes the vast majority of psychologists holding doctoral degrees from accredited universities in the United States.

Some of the Psychological Association's major functions have been to promote psychological research, to improve research methods and to disseminate information regarding human psychological behavior through meet-

ings, scientific publications and special reports. A substantial number of the Psychological Association's members are concerned with the collection of data, development of research, and provision of therapy pertaining to human sexuality. The Psychological Association wishes to inform the Court about the professional knowledge concerning sexual practices that may be relevant in deciding these cases.

The American Psychiatric Association (hereafter "Psychiatric Association"), with approximately 29,000 members, is the nation's leading organization of physicians who specialize in psychiatry. The Psychiatric Association has expert knowledge relevant to the issues in these cases and wishes to provide such information to this Court.

The American Public Health Association (hereafter "APHA") was founded in 1872 with the goal of improving public health and bringing about a higher quality of health care. The APHA works to promote personal and environmental health by setting standards for alleviating health problems, launching public campaigns about specific health dangers, and publishing numerous materials reflecting the latest findings and developments in public health. APHA represents all disciplines and specialties in public health. Together with its affiliated associations, the APHA is the largest public health association in the world. The multidisciplinary membership of approximately 50,000 includes physicians, nurses, immunologists, administrators, laboratory scientists, educators, biomedical researchers, and other health care professionals.

The APHA is particularly able to address the non-deviate nature of the behavior proscribed by the statutes involved in these cases and the absence of a public health rationale to support such statutes.

SUMMARY OF ARGUMENT

These cases involve the validity of New York's Penal Code § 240.35-3 which criminalizes the act of loitering or remaining in a public place for the purpose of engaging in or soliciting another to engage in certain specified, legal, sexual conduct. These cases do not present the question whether the state may criminalize the same sexual conduct between consenting adults in private. The latter question was decided by the New York Court of Appeals in *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987 (1981), which held that New York Penal Code § 130.38, which criminalized such conduct, violated the participants' rights of privacy and equal protection secured by the due process clause of the Fourteenth Amendment. Nevertheless, the New York Penal Code § 130.00-2 still provides that anal and oral sex between persons of the same sex or different sexes, except for people married to each other, is "deviant sexual intercourse." And, section 240.35-3, involved in these cases, makes loitering for the purpose of engaging in such sexual conduct a crime. In order to avoid perjorative and misleading labels, these sex acts will be referred to herein as "variant" sex.

Amici urge the Court to decide only the narrow question before it, not the broader issues presented by *Onofre*. The record in these cases was not developed in response to the questions presented in *Onofre*, and therefore lacks important facts that would be necessary to a decision of the *Onofre* issues.

If the Court should decide, nevertheless, that the nature and prevalence of variant sexual conduct are relevant to these cases, *amici* respectfully request the Court to take into consideration scientific, demographic and clinical information concerning them, as well as the known consequences of criminalizing such acts. Regardless of what moral or theological objections there may be to oral or anal sex, the sexual conduct termed "deviant" by the New York statute is common among heterosexuals, mar-

ried or not, and homosexuals.¹ Mental health professionals, including psychologists and psychiatrists, have found, and the preponderance of current scientific evidence from a variety of disciplines demonstrates, that the variant sexual practices proscribed by New York are not pathological, whether engaged in by persons of different sexes or of the same sex. Rather, clinical research indicates that such sexual conduct can be beneficial to the psychological well-being of participants.

To the extent that laws such as those in New York are intended to deter the development of homosexuality, they are unjustified, because sexual orientation is determined at a very early age, perhaps six years old or younger, apparently independent of homosexual experiences. Once established, sexual orientation is difficult or impossible to alter through therapy or societal pressures. Indeed, homosexuality has been part of almost every culture throughout history, regardless of cultural sanctions.

Furthermore, there is little support for the proposition that criminalizing variant sexual practices deters such practices. For example, there is no greater incidence of

¹ In this brief, the term "homosexual" will refer to people who have a sexual orientation and emotional attraction for and engage in sexual conduct with persons of the same sex. The term "homosexual" should not be confused with "social sex role," the role prescribed by society according to sex; "gender identity," a person's identification of him or herself as male or female; or "gender role," whether a person acts so as to be taken for a male or female. The term "gay" has come to mean a person who identifies himself or herself as homosexual and who may or may not hide the fact. Paul and Weinrich, *Whom and What We Study*, in *HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES* 23 (W. Paul *et al.* ed. 1982) [hereafter *HOMOSEXUALITY*]. This anthology was the final report of the Task Force on Sexual Orientation of Division 9 of the American Psychological Association (The Society for the Psychological Study of Social Issues). The report was a four-year national research and education project commissioned in 1978 and completed in 1982 which produced a comprehensive body of empirical evidence contributed by twenty-two authors and subjected to several independent reviews.

homosexuality in the major European countries which do not criminalize variant sexual practices than there is in jurisdictions in which such conduct is illegal. But the threat of criminal punishment does have a harmful psychological effect upon both heterosexuals and homosexuals who wish to engage in such practices—producing feelings of fear, self-loathing and alienation. Moreover, criminalizing variant sexual conduct stigmatizes transgressors as “deviants” and provides ostensible justification for discrimination against them in employment and civil rights. Criminalizing behavior which is not harmful does little except produce contempt for self and for the law.

Amici respectfully urge this Court to affirm the lower court decision in these cases.

ARGUMENT

I. THE COURT SHOULD NOT REVIEW THE *ONOFRE* DECISION ON THE BASIS OF THE RECORD IN THESE CASES.

A. These Cases Do Not Present the Constitutional Issue of Whether the State May Criminalize Non-Commercial Sexual Conduct Between Consenting Adults in Private—the Issue in *Onofre*.

People v. Uplinger presents this Court with the question of whether the state may criminally punish respondent Uplinger for engaging in a private conversation, not intended to or likely to be overheard by others, in which he solicited another adult to engage, voluntarily and without payment, in private sexual conduct which is not illegal but is termed “deviant” by the state, solely because that private conversation occurred in a public place.² It

² The state apparently does not contend that it can constitutionally criminalize such a conversation occurring in a private place. *People v. Uplinger* was consolidated on appeal with *People v. Butler*. *People v. Uplinger*, 58 N.Y.2d 936, 460 N.Y.S.2d 514 (N.Y. 1983). Susan Butler, a previously convicted prostitute, was arrested after a police officer saw her stopping cars and subsequently engaging in fellatio

has already been determined that the state may not constitutionally punish the conduct itself. In *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.Y.2d 936 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981), the New York Court of Appeals held that a section of the New York Penal Code, which criminalized consensual, non-commercial, "deviant" sexual conduct in private, violated the participants' rights to both privacy and equal protection secured by the Fourteenth Amendment. Thus, it is the constitutionality of the state's loitering laws that is at issue in these cases—not the constitutionality of its consensual sodomy statute, which has already been struck down.

The majority below held that because the state could not constitutionally criminalize noncommercial consensual sodomy in private, it could not prohibit remaining in a public place for the purpose of soliciting another to engage in such conduct—at least not in the absence of a statutory requirement that the public conduct be annoying or offensive to others. The dissent, however, found the statute to be a legislative determination that such solicitations are inherently offensive, and therefore can be regulated by the state along with other kinds of disorderly public conduct. The dissent found the statute an exercise of the state's authority to regulate public nuisances, not an effort to proscribe sexual practices.³

with the driver of one of the cars. (Joint Appendix 2) [hereafter J.A.]. Butler was charged under § 240.35-3 of the New York Penal Code, with loitering to engage in deviant sexual intercourse. Because it is not clear from the record whether Butler is accused of soliciting deviant sexual intercourse or of loitering for the purpose of engaging in such conduct, and because it is not clear whether the public conduct engaged in by Butler was intended to or likely to be observed or overheard by members of the public (see J.A. 6), *amici* will confine their arguments to the facts in the *Uplinger* case.

³ 58 N.Y.2d 936, 937; 460 N.Y.S.2d 514, 515 (1983).

B. The Factual Record in These Cases Is Not Sufficiently Developed to Determine the Constitutional Issues Presented by *Onofre*.

Amici respectfully urge the Court to confine its review to the lower court decision in these cases and not to undertake a review of the *Onofre* decision. Because it is loitering and solicitation of sex which is at issue in these cases, the record below has not been developed to determine the constitutional issues presented and decided in *Onofre*. The record submitted to this Court contains the testimony of various witnesses concerning the character of the neighborhood in which respondents were arrested, and the extent to which the public, merchants and residents of the area had been annoyed in the past by offensive solicitations and public sexual conduct. Witnesses also testified to the use of the loitering act to control prostitution and homosexual conduct. See, e.g., J.A. 6-11, 24. In addition, legislative history was introduced to show that the legislature intended to suppress public nuisances when it enacted the loitering laws by eliminating solicitations which affront the public's moral and aesthetic sensibilities and are a source of annoyance and harassment. 460 N.Y.S.2d 514, 516 citing *Model Penal Code* § 251.3 comment, 476 (Proposed Draft 1962).

If this Court were to review the issues in *Onofre*, it would have to decide whether the acts declared to be "deviant" fall within the zone of privacy protected by the Constitution, whether the state has a legitimate interest in regulating deviant sexual practices, whether the state interest is sufficient to override liberty and privacy interests, and whether there was at least a rational relationship between the means chosen by the state and the legitimate interest of the state to be furthered. The record below does not contain evidence relevant to the determination of those issues.

No expert testimony was presented concerning the nature and extent of the sexual conduct declared "deviant" by New York Penal Code § 130.00-2. Unlike the record

in *Onofre* and other cases in which the constitutionality of sodomy statutes has been challenged, no expert witnesses testified regarding the ostensible benefits of such statutes, either to the general public or to people who might wish to engage in the proscribed conduct.⁴ Nor was there any expert testimony concerning the harmful psychological effects of criminalizing variant sexual practices on people who wish to engage in them. Finally, no legislative history was introduced suggesting the state interests intended by the New York legislature to be furthered by the consensual sodomy laws or the purposes of the "deviant sexual intercourse" provisions. Instead, the parties developed the record and submitted legal briefs wholly in response to the charge of loitering and solicitation.

II. IF THIS COURT FINDS THE NATURE AND EXTENT OF "DEVIANT SEXUAL INTERCOURSE" TO BE RELEVANT IN THE PRESENT CASES, IT SHOULD TAKE INTO ACCOUNT SCIENTIFIC INFORMATION ABOUT SUCH CONDUCT.

A. The Variant Sexual Conduct Declared "Deviant" by the New York Penal Code Is Natural and Common Among Both Heterosexuals and Homosexuals.

The New York Penal Code defines "deviant sexual intercourse" as "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva." New York Penal Code § 130.00-2. Despite the fact that the statute declares such conduct to be "deviant", suggesting that it deviates from some norm and is thus abnormal, research demonstrates that, in fact, such sexual expression is biologically natural and extremely common among both heterosexuals and homosexuals.

⁴ See, e.g., *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), appeal docketed, No. 82-1590 (5th Cir. 1982).

Statistical studies on the number of predominantly heterosexual people who engage in sexual conduct termed "deviant" by New York show that such conduct is commonplace. For example, Kinsey's statistics indicate that 54% of exclusively or predominantly heterosexual men and 49% of exclusively or predominantly heterosexual women engage frequently in the sexual conduct declared deviant by the New York Penal Code.⁵ Kinsey also reported that 60% of married, college-educated people engaged in oral-genital sex on a fairly regular basis.⁶ A more recent study reports approximately 80% of single men and women between the ages of 25 and 34 and 90% of married couples under the age of 25 engaged in oral-genital sex regardless of their educational level.⁷ A very recent study of unmarried university women reported that 61% had performed oral sex on their partners and 68% had experienced their partner performing oral sex on them.⁸

Fewer data exist on the incidence of anal intercourse between men and women. However, one researcher found that 25% of the subjects under 35 years old had experienced anal intercourse in the year preceding the study, with 6% reporting "sometimes" or "often" to the question of frequency of anal intercourse.⁹ Another study found that 30% of the female samples said they enjoyed anal intercourse.¹⁰

⁵ A. KINSEY, W. POMEROY, C. MARTIN, AND P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953); A. KINSEY, W. POMEROY, C. MARTIN, AND P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 368-370 (1948).

⁶ *Id.* Many researchers have consistently reported that oral-genital sex is most common in this country among the highly educated. J. GAGNON, *HUMAN SEXUALITY* 174 (1978); MCCARY, *MCCARY'S HUMAN SEXUALITY* 12 (1978).

⁷ M. HUNT, *SEXUAL BEHAVIOR IN THE SEVENTIES* (1974).

⁸ Harold and Way, *Oral-Genital Sexual Behavior in a Sample of University Females*, 19 *J. OF SEX RESEARCH* 327-338 (1983).

⁹ M. HUNT, *supra* note 7.

¹⁰ S. HITE, *THE HITE REPORT: A NATIONWIDE STUDY ON FEMALE SEXUALITY* 76 (1976).

Although oral-genital and anal-genital sex are engaged in by people of different sexes as well as by people of the same sex, statutes prohibiting such conduct are generally regarded as directed primarily against sexual conduct by homosexuals.¹¹ Indeed, the record shows that New York's loitering statute was used by the police to control homosexual behavior. (J.A. 6-11, 24).

In the 1940's, when homosexuality was seldom a topic for public discussion and scientific research, Kinsey and associates undertook to learn more about its prevalence in their study of 15,000 subjects. These researchers realized that there is no strict dichotomy between homosexual and heterosexual people, but rather a continuum of more and less physical and emotional attraction for and sexual activity with persons of the same sex. Therefore, Kinsey conceived of a scale which begins with category 0 (exclusively heterosexual) to category 6 (exclusively homosexual).¹² Category 5 included individuals who were almost entirely homosexual in their psychological responses and activities but who had incidental heterosexual experiences. In 1948, Kinsey found that at least 10% of the males in his study were homosexuals (categories 5 and 6) for at least three years between the ages of 16 and 55.¹³ He estimated that 25% of the American white male population had more than incidental homosexual ex-

¹¹ See, e.g., Gallo, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration In Los Angeles County*, 13 U.C.L.A. L. REV. 643-832 (1966); M. WEINBERG AND C. WILLIAMS, *MALE HOMOSEXUALS: THEIR PROBLEMS AND ADAPTATIONS* (1974), and see generally, Stivison, *Homosexuals and the Constitution in HOMOSEXUALITY*, *supra* note 1, at 303-321.

¹² A. KINSEY, W. POMEROY, C. MARTIN, AND P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953) [hereafter A. KINSEY (1953)]. Kinsey used both emotional attraction (fantasies) and behaviors to assign ratings of sexual orientation. Object preference is only one important variable in defining sexual expression, along with intensity of feeling, frequency, and length of activity.

¹³ A. KINSEY, W. POMEROY, C. MARTIN, AND P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948).

perience or reactions for the same three year periods.¹⁴ Kinsey also estimated that 50% of all adult men and 28% of all adult women in the United States experienced sexual attraction to members of their own sex, and that about one out of three adult men (37%) and one out of eight adult women (12.5%) had had at least one sexual experience involving orgasm with a member of their own sex.¹⁵

More recent research has not shown that the incidence of homosexuality has measurably increased since the Kinsey studies were conducted over thirty years ago, despite greater tolerance and awareness of homosexual lifestyles.¹⁶ These data cannot be precise because of the social stigma attached to homosexual behavior and the consequent difficulty of obtaining representative samples of people to study. Nonetheless, a recent conservative study estimates that over 5 million persons in the United States are *exclusively* homosexual.¹⁷ A much larger number of people engage in occasional homosexual acts. Thus, some researchers have estimated that the non-exclusive homosexual population, with varying degrees of homosexual orientation, is 25 million men and women.¹⁸

¹⁴ *Id.*

¹⁵ A. KINSEY, *supra* note 12, at 474-475.

¹⁶ Gebhard, *Incidence of Overt Homosexuality in the U.S. and Western Europe*, NIMH TASK FORCE ON HOMOSEXUALITY, DHEW Publication No. (HSM) 9116 (J. Livingood ed. 1972); P. GEBHARD AND A. JOHNSON, *THE KINSEY DATA: MARGINAL TABULATIONS OF THE 1938-1963 INTERVIEWS CONDUCTED BY THE INSTITUTE FOR SEX RESEARCH* (1979); M. HUNT, *SEXUAL BEHAVIOR IN THE SEVENTIES* (1974); H. KATCHADOURIAN AND D. LUNDE, *FUNDAMENTALS OF HUMAN SEXUALITY* (1975).

¹⁷ R. FRANCOEUR, *BECOMING A SEXUAL PERSON* (1982).

¹⁸ Paul, *Social Issues and Homosexual Behavior: A Taxonomy of Categories and Themes in Anti-Gay Argument in HOMOSEXUALITY*, *supra* note 1, at 25-26.

Homosexuality is widely practiced in a variety of societies around the world.¹⁹ Anthropological and historical evidence indicates that homosexuality and other variant sexual practices have been tolerated by most societies throughout the ages. Several historians have traced the social and cultural treatment of homosexual conduct from the ancients to the present.²⁰ Their findings are that homosexuality has been ubiquitous regardless of whether a particular culture admired or vilified it. It was widespread in some ancient classical periods when it was idealized,²¹ and it was "abundant" during the Victorian

¹⁹ Carrier, *Homosexual Behavior in Cross-Cultural Perspective*, in *HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL* (J. Marmor ed. 1980); C. FORD AND F. BEACH, *PATTERNS OF SEXUAL BEHAVIOR* (1951) [hereafter C. FORD and F. BEACH].

²⁰ In the first thousand years of Christianity there was a considerable range of tolerance for homosexual people. J. BOSWELL, *CHRISTIANITY, TOLERANCE & HOMOSEXUALITY*, Chs. 1 and 2 (1980). However, in the Thirteenth Century, St. Thomas Aquinas' concept of homosexual conduct as "unnatural" was embodied in canon law. V. BULLOUGH, *SEXUAL VARIANCE IN SOCIETY AND HISTORY* 380-381 (1976). These ecclesiastical proscriptions against unnatural sex were enforced by the civil authority of the state. As the influence of the Church waned, "sins against nature" became part of the criminal codes of England, Italy and other European countries. P. CONRAD AND J. SCHNEIDER, *DEVIANCE AND MEDICALIZATION: FROM BADNESS TO SICKNESS* 172-179 (1980). What had been sin became a crime. With the Eighteenth Century Age of Enlightenment a spirit of tolerance and investigation was brought to bear on the question of variant sexual conduct. It yielded a concept of health based on earlier concepts of morality. Conduct regarded as moral excesses, such as variant sexual conduct, was believed to make extraordinary demands on the body and lead to disease. What had been made a crime also became an illness, and homosexuality was viewed as pathological. As discussed at notes 28 to 36, *infra*, there is no empirical support for the concept of homosexuality as pathology and it is no longer regarded as such by the vast majority of mental health practitioners or scientific researchers. However, the criminal laws of many states are still based on the disproven concept of "unnatural acts." See discussion below at notes 50 to 56.

²¹ V. BULLOUGH, *supra* note 20; J. BOSWELL, *supra* note 20. Contrary to popular beliefs, no serious classical historian has con-

era when it was condemned.²² Thus, there is no evidence that homosexual conduct is limited to a small group of persons, or that its prevalence increases or decreases significantly as a result of cultural conditions.

Nor does same-sex intercourse, including oral and anal intercourse, deviate from any biological norm. Although such intercourse is sometimes referred to as "abnormal" or "unnatural," this conduct is found throughout the natural animal world. Researchers have found considerable homosexual conduct among domestic and wild animals in captivity.²³ Even in the wild, scientists have observed animals such as lizards, mountain sheep, shore birds and monkeys engage in efforts to copulate with members of the same sex. These activities have been variously interpreted to be demonstrations of dominance, of a need for cooperation in rearing young, of ability to copulate, and of playfulness.²⁴ At the very least, these data show that same-sex behavior is not uniquely human and that it arises spontaneously in nature.²⁵

cluded that the downfall of Greek and Roman civilizations was caused or evidenced by tolerance for homoerotic love. See e.g., GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* (1776); A. ROWSE, *HOMOSEXUALS IN HISTORY* (1977); V. BULLOUGH, *HOMOSEXUALITY, A HISTORY* (1979); J. BOSWELL, *supra* note 20. Some historians find that tolerance and validation of homoerotic love have flourished during some of the highest points of civilization. E. WESTERMARCK, *THE ORIGIN AND DEVELOPMENT OF MORAL IDEAS* (1908).

²² Karlen, *Homosexuality in History*, in *HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL* (J. Marmor ed. 1980).

²³ A. KINSEY (1953), *supra* note 12, Ch. 11; C. FORD and F. BEACH, *supra* note 19, at 125-143.

²⁴ Weinrich, *Is Homosexuality Biologically Natural?* in *HOMOSEXUALITY*, *supra* note 1, at 197-208.

²⁵ Some researchers believe that homosexual behavior in the natural world may serve biologically adaptive purposes. See Kirsch and Rodman, *Selection and Sexuality: The Darwinian View of Homosexuality* in *HOMOSEXUALITY*, *supra* note 1, at 183-185; Evans, *A Conversation With Konrad Lorenz*, 8 *PSYCHOLOGY TODAY* 83-94 (June 1974). Lorenz notes that the aversive emotional reaction of

Finally, research does not suggest that same-sex orientation and sexual activity is the product of abnormal physiology. Although some researchers have postulated that homosexuality may result from hormonal imbalance,²⁶ a series of studies has failed to establish that homosexual people are characterized by abnormal hormone levels.²⁷

Amici submit that statistical and biological research does not support the propositions that same-sex orientation and variant sexual conduct are uncommon, are not found in nature, or are the result of abnormal physiological characteristics. Therefore, it is not scientifically accurate to characterize same-sex oral or anal intercourse as "deviant," if that term is used to imply that such conduct deviates from some statistical, biological or physiological norm.

B. Variant Sexual Conduct by Heterosexuals or by Homosexuals Is Not Pathological or Harmful.

Nor does sexual conduct defined by § 130.00-3 of the New York Penal Code deviate from any psychological

many people to homosexual behavior is really aesthetic rather than logical, for from an ethological perspective in an overpopulated world, more, rather than less, homosexuality would be beneficial.

²⁶ E.g., Kolodny, Masters, Kolodner and Toro, *Plasma Testosterone and Semen Analysis in Male Homosexuals*, 16 NEW ENG. J. MED. 1170-1174 (1971).

²⁷ See, e.g., Barlow, Abel, Blanchard, and Mavissakalian, *Plasma Testosterone Levels and Male Homosexuality: A Failure to Replicate*, 3 ARCHIVES OF SEXUAL BEHAVIOR 571 (1974); Doerr, Kockott, Bogt, Pirke, and Dittmar, *Plasma Testosterone, Estradiol, and Semen Analysis in Male Homosexuals*, 29 ARCHIVES OF GENERAL PSYCHIATRY 829 (1973); and Parks, Korth-Schütz, Penny, Hilding, Dumars, Farasier, and New, *Variation in Pituitary-gonadal Function in Adolescent Male Homosexuals and Heterosexuals*, 39 J. OF CLINICAL ENDOCRINE METABOLISM 796 (1974). But see, Doerr, Pirke, Kockott and Kittmar, *Further Studies on Sex Hormones in Male Homosexuals*, 33 ARCHIVES OF GENERAL PSYCHIATRY 611 (1976); Gatrell, Loriaux and Chase, *Plasma Testosterone in Homosexual and Heterosexual Women*, 134 AM. J. OF PSYCHIATRY 1117 (1977); and Tourney, Petrilli and Hatfield, *Hormonal Relationships in Homosexual Men*, 132 AM. J. OF PSYCHIATRY 288 (1975).

norm. *Amicus* American Psychiatric Association's *Diagnostic and Statistical Manual* (Third Edition) which is used as an authoritative description of diagnostic categories of mental disorders by health care practitioners and in the insurance industry, does not include in its definitions of pathological sexual syndromes either oral or anal sex between persons of the same sex or of the opposite sex.²⁸ Mental health clinicians have long observed that diverse expressions of sexual feelings between consenting adults are not symptoms of mental disorder, but rather of mental health. Mental problems associated with variant sexual expression, whether engaged in by heterosexual or homosexual people, are usually the product of internalized social condemnation or of external pressure and ostracism of those who practice it. Thus, the pathologies sometimes associated with variant sexual practices can be viewed as social pathology rather than as personal pathology.²⁹ In any event, there are few or no data which show that engaging in a variety of sexual expressions, including oral and anal sex, results in mental or physical dysfunction. Indeed, repression of desires for such expression can lead to dysfunction and pathology.³⁰

The fact that variant sexual conduct, such as oral-genital sex, takes place between persons of the same sex does not make such conduct harmful or the participants pathological. Although in the past, there was consider-

²⁸ AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL*, 261-283 (3rd ed. 1980) [hereafter *DSM-III*]. The *DSM-III* lists "ego-dystonic homosexuality" as a mental disorder consisting of a desire of a homosexually behaving person to acquire or increase heterosexual arousal. *DSM-III* at 281.

²⁹ Gonsiorek, *Social Psychological Concepts in the Understanding of Homosexuality* in *HOMOSEXUALITY*, *supra* note 1, at 115-119 (1980).

³⁰ Coleman, *Developmental Stages of the Coming-Out Process* in *HOMOSEXUALITY*, *supra* note 1, at 150-151 (1982); P. FISHER, *THE GAY MYSTIQUE, THE MYTH AND REALITY OF MALE HOMOSEXUALITY* 249 (1972).

able debate whether people who engaged in sexual conduct with members of the same sex were suffering from a mental disorder, the majority of mental health professionals no longer consider homosexuality to be a mental disorder.³¹ In 1973, *amicus* American Psychiatric Association passed a resolution which removed homosexuality from its list of mental disorders, stating that "homosexuality per se implies no impairment in judgment, stability, reliability or general social or vocational capabilities." The Psychiatric Association declared that "[i]n the reasoned judgment of most American psychiatrists today, homosexuality per se does not constitute any form of mental disease."³² In 1975, *amici* Psychological Association and *amici* American Public Health Association passed resolutions supporting the Psychiatric Association's removal of homosexuality from its list of mental disorders and urging all mental health professionals to help dispel the stigma of mental illness that had long been associated with homosexual orientation.³³

³¹ A mental disorder is defined in *DSM-III* as "a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is typically associated with either a painful symptom (distress) or impairment in one or more important areas of functioning (disability)." *DSM-III* at 6.

³² Resolution of the American Psychiatric Association, December 15, 1973. The rationale for the removal of homosexuality from the list of mental disorders in *DSM-II* is supported as follows:

A significant proportion of homosexuals are apparently satisfied with their sexual orientation, show no significant signs of manifest psychopathology (unless homosexuality, by itself, is considered psychopathology), and are able to function socially and occupationally with no impairment. If one uses the criteria of *distress* or *disability*, homosexuality per se is not a mental disorder. If one uses the criterion of *inherent disadvantage*, it is not at all clear that homosexuality is a disadvantage in all cultures or subcultures.

DSM-III at 380.

³³ Resolution of the Council of Representatives of the American Psychological Association (1975); Resolution No. 7514 of the American Public Health Association (1975).

This official declassification of homosexuality as a mental disease was the result of a long process of re-evaluation of the illness model of homosexuality and was based on extensive scientific findings by a large number of independent researchers. The first major challenge to the illness model came in 1957 when Evelyn Hooker determined that homosexual and heterosexual men could not be distinguished from one another on the basis of standard psychological tests.³⁴ These findings stimulated a flood of psychological research over the next two decades which overwhelmingly demonstrated that homosexuality is not related to psychopathology or psychological maladjustment.³⁵ Of course, some homosexuals are psychologically disturbed, just as some heterosexuals are psychologically disturbed. But homosexuality bears no necessary relationship to psychological adjustment.³⁶

³⁴ Evelyn Hooker's research studied 30 homosexual and 30 heterosexual men, neither group being involved in the legal system or undergoing psychotherapy. She gave them each a battery of projective psychological tests and then gave all 60 test protocols to a 3 person panel of psychological test experts. When asked to differentiate the two groups using these testing protocols, the experts were unable to do so. Hooker concluded that homosexuality *per se* did not constitute a psychiatric entity, and that there was no reason to believe that homosexuality *per se* was pathological. Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. OF PROJECTIVE TECHNIQUES 17-31 (1957).

³⁵ Gonsiorek, *Results of Psychological Testing in Homosexual Populations*, AM. BEHAV. SCIENTIST 385, 394 (1982) [hereafter Gonsiorek].

³⁶ One commentator who reviewed the psychological studies of homosexual people concluded "[u]ntil the findings cited here are overturned by psychological test data of equal or better research design, breadth and numbers, theories contending that the existence of differences between homosexuals and heterosexuals implies maladjustment are irresponsible, uninformed, or both." Gonsiorek, *supra* note 35. See also, Meredith and Riester, *Psychotherapy, Responsibility and Homosexuality: Clinical Examination of Socially*

Although it is clear that same-sex orientation and activity do not indicate mental disorder and illness, it is not so clear why some people have a same-sex orientation. Science does know that sexual orientation is developed at a very early age, perhaps by the age of six and certainly by adolescence, and that it develops independent of isolated sexual experiences. Various theories have been postulated to explain the formation of sexual orientation, but few are supported by reliable data. Several popular theories have been largely disproven.

One such theory is that homosexuality is caused by disturbed family relationships. Thus, it has been suggested that a boy who grows up with a dominating, overintimate mother and an absent or rejecting father is more likely to be homosexual than a boy who has experienced other parenting patterns.³⁷ This theory, first suggested in 1962, was based on clinical studies.³⁸ However, it has not been substantiated by later studies which indicate that there is no necessary relationship between parenting patterns and homosexual offspring.³⁹

Other researchers have postulated that homosexuality is caused by fear or hatred of the other sex. However, research on the origins of sexual orientation has shown that these factors do not cause homosexuality.⁴⁰ Further, such studies showed that homosexual men and women

Deviant Behavior, 11 PROFESSIONAL PSYCHOLOGY 174-193 (1980); Riess, *Psychological Tests in Homosexuality* in HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL (J. Martinor ed. 1980).

³⁷ I. BIBER, H. DAIN, H. DINCE, P. DRELICH, M. GRAND, H. GUNDLACK, R. KREMER, A. RIFKIN, C. WILBUR AND T. BIBER, *HOMOSEXUALITY: A PSYCHOANALYTIC STUDY* (1962).

³⁸ See, e.g., A. BELL, M. WEINBERG AND S. HAMMERSMITH, *SEXUAL PREFERENCE: ITS DEVELOPMENT IN MEN AND WOMEN* (1981) [hereafter A. BELL].

³⁹ J. Gonsiorek, *supra* note 35; Coleman, *Changing Approaches to the Treatment of Homosexuality* in HOMOSEXUALITY, *supra* note 1, at 81-82.

⁴⁰ See e.g., A. BELL, *supra* note 38.

were not particularly lacking in heterosexual experiences during their childhood and adolescent years. The data do not support the idea that early childhood homosexual activity has any direct relationship to later sexual orientation.⁴¹ Indeed, there are no empirical data from these studies to support the popular myth that the development of homosexual orientation or behavior results from "contagion" by other homosexuals. The only consistent findings seem to be that homosexuals have many more and much stronger sexual fantasies about members of their own sex, and that these fantasies appear during childhood and early adolescence.⁴² Therefore, either encouraging or discouraging adult homosexual behavior is not likely to have any significant effect on the development of that individual's sexual orientation.⁴³

C. Variant Sexual Conduct Is Beneficial to Many Heterosexuals, Homosexuals, and Disabled People.

As noted, variant sexual conduct is not harmful or pathological. In fact, it is believed by many psychotherapists to be of positive benefit to some people, both

⁴¹ A. BELL, *supra* note 38. One research study showed that 62% of the heterosexual men reported that their first sexual encounter was with another male, while only 39% of the homosexual men reported such experience. However, homosexual men reported more enjoyment in their homosexual activities. These studies support the idea that temporal sequence is not important in the development of sexual orientation. *Id.* at 97-113; Stephan, *Parental Relationships and Early Social Experiences of Activist Male Homosexuals and Male Heterosexuals*, 3 J. OF ABNORMAL PSYCHOLOGY 82 (1973).

⁴² Storms, *Theories of Sexual Orientation*, J. OF PERSONALITY AND SOC. PSYCHOLOGY 783-792 (1980).

⁴³ Kimmel, *Psychotherapy and the Older Gay Man*, 14 PSYCHOTHERAPY: THEORY, RESEARCH AND PRACTICE 386 (1977). This commentator suggests that the preference for homosexual or heterosexual behavior is so deeply embedded that it may be maintained even in the case of considerable pressure and contrary experience. This phenomenon may explain why people with strong homosexual fantasies often lead a life of extended periods of exclusive homosexuality but have alternating periods of heterosexuality when circumstances require it.

heterosexuals and homosexuals. The theme of sexual flexibility appears throughout the scientific literature on sex therapy. Virtually every expert in the field has recognized the importance of sexual and even orgasmic contact through behaviors other than vaginal intercourse. The underlying theme of Masters and Johnson's once-innovative sex therapy was one of abstinence from intercourse and use of "sensate focus" exercises to expand a couple's sensitivity and sexual repertoire.⁴⁴

Other internationally known experts, such as Helen Singer Kaplan and the thousands of practitioners in sex therapy, work from the assumptions that reliance on vaginal intercourse as a sole sexual outlet is not healthy, and that couples need to expand their behavior options. Oral-genital contact, in fact, has been specifically recommended for inorgasmic women, since it is only a minority of women who respond orgasmically to intercourse without other stimulation.⁴⁵ Other writers of popularly used human sexuality texts for college students consistently support the concept of non-vaginal sexual contact to enhance sexual functioning and health.⁴⁶ Thus, sexual expression through a variety of conducts can be a step toward more intimate sharing within a conventional heterosexual or homosexual relationship, having positive,

⁴⁴ W. MASTERS AND V. JOHNSON, *HUMAN SEXUAL RESPONSE* (1966); W. MASTERS AND V. JOHNSON, *HUMAN SEXUAL INADEQUACY* (1970).

⁴⁵ L. BARBACH, *FOR YOURSELF, THE FULFILLMENT OF FEMALE SEXUALITY* (1975) [hereafter BARBACH].

⁴⁶ Furthermore, even among married couples seeking fertility counseling and wanting to reproduce, behaviors other than vaginal intercourse are commonly recommended as a way to ease the pressure and perhaps increase sexual arousal and frequency of orgasm, which is known to increase the probability of conception in women. J. GAGNON, *HUMAN SEXUALITIES* 131, 193-214 (1977). See also, R. KOLODNY, W. MASTERS AND V. JOHNSON, *TEXTBOOK ON SEXUAL MEDICINE* (1979); H. KATCHEDOURIAN AND D. LUNDE, *FUNDAMENTALS OF HUMAN SEXUALITY* (1975); MCCARY, *MCCARY'S HUMAN SEXUALITY* (1978).

long-term effects on the individual's mental health and contribution to society.

In addition, heterosexual people who are unable to engage in vaginal intercourse because of age or physical handicap also benefit from the intimate sexual contact that is provided by non-coital sexual behavior. Such individuals are encouraged by their therapists and rehabilitation specialists to use such behaviors as oral-genital contact to insure the continuation of a physical relationship with their loved ones. Such contact, in fact, has been shown to be a crucial determinant of survival itself for certain patients who may not be able to have intercourse and would otherwise terminate physical contact relationships.⁴⁷ Similarly, persons experiencing sexual dysfunction benefit from therapy that requires the use of non-coital sexual techniques.⁴⁸ These techniques improve mental health by increasing feelings of sexual competence, intimacy and self-esteem. Also, heterosexual couples who do not desire to produce a pregnancy may choose to engage in non-coital sexual behavior in addition to, or instead of, using contraception. Finally, homosexual persons benefit by engaging in behavior that affirms their self-concept, provides emotional satisfaction and allows the formation of long-term bonds.⁴⁹

⁴⁷ J. LYNCH, *THE BROKEN HEART: THE MEDICAL CONSEQUENCES OF LONELINESS* (1977).

⁴⁸ L. BARBACH, *supra* note 45.

⁴⁹ Peplau, *What Homosexuals Want In Relationships*, 15 *PSYCHOLOGY TODAY* 28-30 (1981).

III. CRIMINALIZATION OF PRIVATE, CONSENSUAL, VARIANT SEXUAL PRACTICES DOES NOT BENEFIT SOCIETY OR PEOPLE WHO WOULD ENGAGE IN SUCH PRACTICES.

A. Criminalization Does Not Deter Variant Sexual Practices Or Affect the Prevalence of Homosexuality.

Given what we know about the fundamental nature and strength of the sex drive in humans, it is unrealistic to think that fear of criminal sanction will effectively deter forbidden sexual conduct in private between consenting adults, whether they are heterosexual or homosexual. Indeed, if the threat of social ostracism, humiliation, loss of job, friends and salvation, as well as the threat of venereal disease, does not deter variant sexual conduct, surely the slim possibility of an arrest and prosecution for private conduct would not effectively deter proscribed sexual practices.⁵⁰

The authors of the famous *Wolfenden Report*, based on a ten-year study by Great Britain's Committee on Homosexual Offenses and Prostitution, predicted that decriminalizing homosexual acts would have little effect. Noting the argument that decriminalization would be seen as condoning homosexual acts and might result in a great increase in such conduct, the authors stated:

This expectation seems to us to exaggerate the effect of the law on human behavior. It may well be true that the present law deters from homosexual acts some who would otherwise commit them, and to that extent an increase in homosexual behavior can be expected. But it is no less true that if the amount

⁵⁰ There are data indicating that criminalizing sodomy not only does not deter variant practices but results in secretiveness and repression of homosexual desires and causes some homosexuals to seek out anonymous partners in public places. R. HUMPHREYS, *THE TEAROOM TRADE: IMPERSONAL SEX IN PUBLIC PLACES* (1970); Miller and Humphreys, *Lifestyles and Violence: Homosexual Victims Assault and Murder*, 3 *QUALITATIVE SOCIOLOGY* 169-185 (1980).

of homosexual behavior has, in fact increased in recent years, the law has failed to act as an effective deterrent. It seems to us that the law itself probably makes little difference to the amount of homosexual behavior which actually occurs; whatever the law may be there will always be strong social forces opposed to homosexual behavior.

The Wolfenden Report, para. 58 (1957).

In addition, criminalization of homosexual conduct will not affect the prevalence of homosexual orientation. As discussed above, homosexual orientation is not a matter of choice. It is a set of emotions and proclivities established early in life and, once established, is not easily modified. All researchers agree that the sexual orientation of only a small fraction of homosexual people who are highly motivated to change has been or can be modified through therapy.⁵¹ Thus, consensual sodomy laws deter only a marginal amount of overt homosexual behavior and can have little or no effect on the prevalence of homosexual orientation.

The futility and inappropriateness of criminalizing consensual sexual practices, both heterosexual and homo-

⁵¹ Nevertheless, some homosexual persons, and some psychotherapists, desire to bring about change in sexual orientation. Studies of the effectiveness of therapy to bring about this change indicate it is dependent upon the strength of desire to become heterosexual and the extent and intensity of heterosexual experience and fantasy, regardless of the type of therapy used. One researcher estimated that only 20-50% of "highly motivated" homosexuals shift from avoiding to enjoying heterosexual relations. Marmor, *Clinical Aspects of Homosexuality*, in *HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL* 277 (J. Marmor ed. 1980). It is also apparent that changing sexual behavior does not necessarily change an individual's sexual orientation or fantasy life. C. TRIPP, *THE HOMOSEXUAL MATRIX* 252 (1975). Moreover, for many homosexuals, seeking to change sexual orientation would be an inappropriate goal of psychotherapy. Davison, *Politics, Ethics and Therapy for Homosexuality* in *HOMOSEXUALITY* *supra* note 1, at 89-98; A. BELL, M. WEINBERG AND S. HAMMERSMITH, *HOMOSEXUALITIES, A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 221 (1978).

sexual, has been widely recognized. *The Wolfenden Report*, mentioned above, recommended decriminalization of England's consensual sodomy laws in 1957.⁵² Most European countries have either never had laws against consensual sodomy, or have repealed them.⁵³ On the other hand, the Soviet Union and several of its satellite countries continue to punish private sexual acts between consenting adults.⁵⁴

In the United States, the American Law Institute removed the consensual sodomy provisions from the Model Penal Code in 1955, and recommended that states having laws against consensual sodomy repeal them. Its commentators stated:

The Code does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor. Such matters are best left to religious, educational and other social influences.

The American Law Institute, *Model Penal Code*, Article 207.1, comment (1955).

Many professional associations have come to the same conclusion, and have strongly advocated the repeal of laws which criminalize any non-commercial sexual con-

⁵² COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, *THE WOLFENDEN REPORT* (1957).

⁵³ France, Spain, Portugal, Italy, Belgium and the Netherlands, countries whose criminal laws are derived from the Napoleonic Code, have not had laws against consensual sodomy. Denmark, Switzerland, Sweden, Hungary, Czechoslovakia, England, Wales, East Germany, West Germany, Finland, Austria and Norway have repealed their sodomy laws in this century, while the Soviet Union, Rumania, Bulgaria, Yugoslavia, Ireland and Scotland have retained their criminal sexual conduct statutes. H. KATCHADOURIAN AND D. LUNDE, *FUNDAMENTALS OF HUMAN SEXUALITY* 511 (2nd ed. 1975).

⁵⁴ *Id.*

duct between consenting adults in private. Among them are *amicus* American Psychological Association, *amicus* American Public Health Association, the American Bar Association, the American Medical Association, and the National Association of Social Workers.⁵⁵ In addition, many major religious groups have opposed criminalization of consensual, private homosexual conduct, even though some of them continue to regard such behavior as sinful or immoral.⁵⁶

In response, many states have re-evaluated their interest in keeping consensual sodomy laws on the books, and have determined that they serve no legitimate purpose. Twenty-three states have now repealed their laws criminalizing oral-genital sex and other private sexual conduct between consenting adults. Criminal consensual sodomy

⁵⁵ Resolution of the Council of Representatives of the American Psychological Association (January 1975); Resolution of the American Bar Association House of Delegates, Summary of Action (August 1973) at p. 23; Resolution No. 7514 adopted by the American Public Health Association (1975); and Resolution adopted in lieu of Report I by the American Medical Association House of Delegates, Annual Meeting Report, p. 84 (1975). Cf. American Sociological Association (ASA), Resolution of ASA Council, (January 1978) ("the American Sociological Association affirms its opposition to oppressive action against homosexuals and its commitment to their civil rights"); National Association of Social Workers (NASW), Policy Statement on Gay Issues, adopted by NASW Delegate Assembly (1977) (The Association deplores and will work to combat archaic laws, discriminatory employment practices, and any of the forms of discrimination which serve to impose something less than equal status upon homosexually oriented members of the human family).

⁵⁶ These groups include the United Church of Christ, the Lutheran Church of America, the Methodist General Conference, the United Presbyterian Church, the Society of Friends, the Episcopal Church, American Baptists, the Unitarian Universalists and the National Council of Churches. Hiltner, *Homosexuality and the Churches in HOMOSEXUALITY: A MODERN REAPPRAISAL* (1980); PRESBYTERIAN BLUE BOOK I & II, REPORT ON THE CHURCH AND HOMOSEXUALITY (1978).

laws have been declared unconstitutional by the highest courts in four additional states.⁵⁷

The experience of the jurisdictions in which consensual sexual conduct is not criminal, including oral and anal sex between consenting adults of the same-sex, seems to be that the prevalence of homosexuality is about the same as jurisdictions in which it is illegal. Thus, the prevalence of homosexuality in the United States, where until recently a majority of states criminalized homosexual acts, has not been appreciably less than it has been in countries in Europe where consensual sodomy has not been criminal for many years.⁵⁸ Nor are *amici* aware of any data indicating that the incidence of public lewdness, child molestation, rape or prostitution varied significantly when consensual sodomy laws were repealed in various states.

Amici respectfully submit that because the desire to engage in variant sex is a strong and fundamental drive, efforts to punish private variant sexual conduct will be unenforceable. Moreover, because homosexuality is neither acquired nor eliminated voluntarily, punishment of that status is irrational. It is not surprising, then, that the experience of other countries and states which have eliminated consensual sodomy laws makes it clear that such laws do not significantly deter variant sexual conduct or decrease the incidence of homosexuality.

⁵⁷ Rivera, *Our Straight Laced Judges: The Legal Position of Homosexual Persons In The United States*, 30 HASTINGS L.J. 799 (1979) and Massachusetts, *Commonwealth v. Balthazar*, 366 Mass. 298, 318 N.E.2d 478 (1974); New Jersey, 1978 N.J. Laws, Ch. 95, § 2C:98-2 (effective Sept. 1, 1979); New York, *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), cert. denied, 451 U.S. 937 (1981); Pennsylvania, *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980); Texas, *Baker v. Wade*, 533 F. Supp. 1121 (N.D. Tex. 1982), appeal docketed No. 82-1590 (5th Cir. 1982); Wisconsin, 1983 Assembly Bill 250, Wisconsin Act, 17, § 4 (effective date, May 12, 1983).

⁵⁸ M. WEINBERG AND C. WILLIAMS, *MALE HOMOSEXUALS: THEIR PROBLEMS AND ADAPTATIONS* (1974).

B. Criminalization of Variant Sexual Conduct between Consenting Adults Is Psychologically Harmful to Them.

Criminal laws outlawing variant sexual behavior do not deter the conduct they are intended to eliminate, but they do cause substantial psychological harm. The existence and occasional enforcement of consensual sodomy statutes harm homosexuals by stigmatizing them as deviants. In fact, the term "deviant" as used in the social sciences refers to the social reaction to behavior, not to the intrinsic characteristics of the behavior itself:

Deviance is not a quality of the act a person commits, but rather a consequence of the application by others of rules and sanctions to an offender. The deviant is one to whom that label has been successfully applied; deviant behavior is behavior that people so label.⁶⁰

Data from sociological studies of deviance indicate that, once the deviant is so labeled, society will misperceive his or her behavior so that all his or her behavior will be construed as manifesting deviancy.⁶¹

This process occurs in the case of homosexuals in part because of the criminalization of their behavior by the state. Because the behavior of homosexuals is labeled "deviant" and punishable by criminal law, they become stigmatized and are viewed as undesirable stereotypes. People who entertain the stereotype will interpret actions of the stigmatized person to fit the stereotype and will act toward the person in ways which would be ap-

⁶⁰ H. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1963). The term "stigma" is used to refer to an attribute possessed by a person which actually or potentially causes society to label and treat that person as deviant. See generally, K. PLUMMER, *SEXUAL STIGMA: AN INTERACTIONIST ACCOUNT* (1975); Gonsiorek, *Social Psychological Concepts in the Understanding of Homosexuality*, 25 AM. BEHAVIORAL SCIENTIST 483, 485 (1982) [hereafter Gonsiorek].

⁶¹ *Id.*

propriate, if at all, only if that person actually were the stereotype.⁶¹ In the case of homosexuals, stigma and stereotyping results in discrimination against them in jobs, and other essential aspects of life.⁶²

In addition, stigma and stereotyping affect the personality of the person so stigmatized. Thus, homosexuals who are treated as deviants develop coping mechanisms in response to the resulting prejudice. These coping mechanisms are common traits in most persecuted groups, including ethnic and racial minorities. The traits include excessive concern with the minority group membership, feelings of insecurity, denial of membership in the group, withdrawal, self-derision, self-hatred, militancy, neuroticism, and acting out self-fulfilling prophecies about one's own inferiority.⁶³ These undesirable personality traits experienced by some homosexuals have been described

⁶¹ Gonsiorek, *supra* note 59.

⁶² See e.g., *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969) (due process required where dismissal from federal employment is based on employee's homosexuality); *Morrison v. State Board of Education*, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969) (state required to find teacher's homosexual conduct made him unfit to teach before revoking his teacher's license); *People v. Brown*, 49 Mich. App. 358, 212 N.W.2d 55 (1973) (lesbian relationship not sufficient to render a home unfit for children); *Owles v. Lomenzo*, 38 App. Div. 2d 981, 329 N.Y.S.2d 181 (1972), *aff'd per curiam*, sub. nom. *Gay Activists Alliance v. Lomenzo*, 31 N.Y.2d 965, 293 N.E.2d 255, 341 N.Y.S.2d 108 (1973) (secretary of state required to accept articles of incorporation of a gay rights organization despite his finding its name "inappropriate"); *Kerma Restaurant Corp. v. State Liquor Authority*, 27 App. Div. 2d 918, 278 N.Y.S.2d 951 (1967) (mere congregation of homosexuals in bar found insufficient grounds for suspension of liquor license for maintaining "disorderly premises"); *Gandurey Marino v. Murff*, 183 F. Supp. 565 (S.D.N.Y. 1959), *aff'd mem.*, 278 F.2d 330 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960) (alien convicted of violating New York's law against loitering to solicit deviant sexual intercourse found barred from immigration because of conviction for crime of "moral turpitude").

⁶³ G. ALLPORT, *THE NATURE OF PREJUDICE* (1954).

by psychoanalysts.⁶⁴ These data support the conclusion that homosexuality *per se* is not a mental disorder but that life in a hostile society may generate stress and anxiety which result in neuroticism and mental disorders. Those homosexuals who come to terms with their sexual orientation and integrate it into their personal lives are the most psychologically well-adjusted of this group.⁶⁵ Those homosexuals who repress their homosexual orientation have been shown to be the most troubled and dysfunctional.⁶⁶

In summary, *amici* respectfully submit that there are sound psychological data indicating that engaging in the sexual conduct termed "deviant" by New York is not uncommon, unnatural, pathological or harmful, and may be an indication of mental health. Further, *amici* submit that criminalization of variant sexual conduct does not deter it significantly or reduce the incidence of homosexuality, but does cause serious psychological harm.

⁶⁴ E. BERGLER, *HOMOSEXUALITY: DISEASE OR A WAY OF LIFE* (1956); L. HATTERER, *CHANGING HOMOSEXUALITY IN THE MALE* (1970); and see, Coleman, *Changing Approaches to the Treatment of Homosexuality: A Review in HOMOSEXUALITY*, *supra* note 1, at 81.

⁶⁵ Coleman, *supra* note 64.

⁶⁶ A. BELL, AND M. WEINBERG, *HOMOSEXUALITY: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* (1978); Hammersmith and Weinberg, *Homosexual Identity: Commitment, Adjustment, and Significant Others*, *SOCIOMETRY* 36, 56-57 (1973); M. WEINBERG AND C. WILLIAMS, *MALE HOMOSEXUALS: THEIR PROBLEMS AND ADAPTATIONS* (1974).

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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STATE OF NEW YORK,

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On Writ Of Certiorari To The
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MOTION FOR LEAVE TO FILE BRIEF AMICUS
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CURIAE OF CENTER FOR CONSTITUTIONAL
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SUPPORT OF RESPONDENTS

The CENTER FOR CONSTITUTIONAL RIGHTS
and the NATIONAL LAWYERS GUILD respect-
fully move for leave to file the attached
brief amicus curiae in support of Respon-
dents Robert Uplinger and Susan Butler
and to urge affirmance of the judgment of
the New York Court of Appeals which found
New York Penal Law §240.35(3)

unconstitutional. People v. Uplinger, 58 N.Y.2d 936, 460 N.Y.S.2d 514 (1983).

The CENTER FOR CONSTITUTIONAL RIGHTS (CCR) is a non-profit legal and educational corporation founded in 1966 and is dedicated to advancing and protecting the rights and liberties guaranteed by the Bill of Rights. CCR, which filed a brief amicus curiae in the court below, has been involved with numerous cases involving the rights to freedom of speech, association and privacy--especially where interference with those rights is based on social disapproval of lifestyle or belief, e.g., Harris v. McRae, 448 U.S. 297, reh. den. 448 U.S. 917 (1980) (involving poor women's rights to non-discriminatory medicaid coverage for abortion), and Drew Municipal Separate School District v. Andrews, 507 F.2d 611 (5th Cir. 1975), cert. dismissed as improvidently granted, 425 U.S. 559

(1976) (securing the right of unwed mothers to retain teaching positions despite social disapproval).

THE NATIONAL LAWYERS GUILD (NLG), also amicus below, is an organization of nearly 8,000 lawyers, law students and legal workers dedicated to the goal of full equality for all people. Since its inception in 1937, the NLG has worked consistently for the advancement of the rights of poor and working people, women, racial minorities and groups striving for social justice. Its Gay Rights Task Force seeks to end discrimination against gay men and lesbians and has been involved in challenging anti-gay loitering and solicitation laws.

NLG and CCR also have a long history of opposing police practices which deprive individuals of their constitutional rights and they are concerned about the abusive and intrusive police

practices used against "suspected" homosexuals to enforce the statute at issue here.

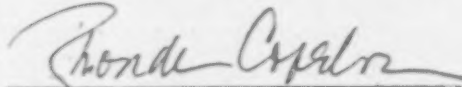
The attached brief of amici includes a history of the legal oppression of certain groups in our society by protecting public sensibilities at the expense of civil rights and liberties. The history of the notion that there is a proper place, out of sight, for those who are deemed offensive, is particularly appropriate to this case.

The amicus brief also highlights certain issues of first amendment and privacy rights and is unique in its examination of the gender-discriminatory character of the statute at issue.

Counsel for Petitioner has refused to consent to the filing of this brief,

while counsel for Respondents have
consented.

Respectfully submitted,



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Respondents.

On Writ Of Certiorari To The
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BRIEF AMICUS CURIAE OF CENTER
FOR CONSTITUTIONAL RIGHTS AND
NATIONAL LAWYERS GUILD IN
SUPPORT OF RESPONDENTS

INTEREST OF AMICI

The interest of amici appears in the
foregoing motion.

STATEMENT OF THE CASE

Because petitioner's statement of the
case gravely distorts the record, amici \

find it necessary to clarify the background at some length:

At 2:50 a.m. in the middle of a busy area of Buffalo similar to New York City's Greenwich Village (JA 36-37), Steven Nicosia, an undercover member of the Buffalo Police Department vice squad, was loitering to engage suspected homosexuals in conversation and to arrest them upon an explicit proposition for sexual activity. People v. Uplinger, 111 Misc.2d 403, 406, 444 N.Y.S.2d 373, 375 (Buffalo City Ct. 1981).

Robert Uplinger walked by and said "hi, how are you," People v. Uplinger, 111 Misc.2d at 406, 444 N.Y.S.2d at 375. The two men talked for approximately 10-15 minutes, during which time the undercover officer sought a number of times to elicit from Uplinger an explicit invitation to have sex:

Mr. Uplinger walked up to me and began a conversation; it was just a brief conversation more or less to the extent of hello, how are you, that type of thing. After a little bit of conversation the defendant asked me if I wanted to get high and I said no. He said, "well, what do you like to do?", and I said, "I don't know, what do you like to do?". This went back and forth for a minute or so.... Three of four other males came up to this 140 North Street which is the step of the Hotel Lenox, Mr. Uplinger introduced me to several of these males, just after that, this undercover police vehicle pulled up and told us all to get off the steps and leave the area of the hotel; we all left in separate directions, I walked west on North Street away from the hotel, Mr. Uplinger followed me and he asked me if I wanted to go to his place and again I asked him what he wanted to do and he said something to the effect, well do you want to come over. And I told him no... I told him, no, I'm scared with the police and I want to leave--I'm going to leave and he said, well if you drive me over to my place I'll blow you. (JA 104).

Uplinger was then arrested for violating Penal Law §240.35(3) which prohibits

loitering for the purpose of solicitation for "deviate" sexual intercourse.¹

This fact pattern is typical of the manner in which Penal Law §240.35(3) is enforced. People v. Uplinger, 111 Misc.2d at 402, 444 N.Y.S.2d at 376.² According

¹"Deviate" sexual intercourse is defined in Penal Law §130.00(2) as "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva." (McKinney, 1975). The term "deviate" sex is used in this brief only because it is the language used in the statutes in question. Amici question whether the term "deviate" is appropriately used to describe sexual practices engaged in by the overwhelming majority of people, both heterosexual and homosexual, in this society and elsewhere. P. Blumstein and P. Schwartz, American Couples, 231-237 (1983).

²Until very recently, it has been enforced exclusively against purely noncommercial homosexual solicitations made in a discreet non-obtrusive manner (JA 61, 65, 72-73, 107, 111 Misc.2d at 405, 444 N.Y.S.2d at 375). The arrest of Butler and testimony at the hearing indicate recent use of the statute against female prostitutes in an effort
(Footnote Continued)

to a 15-year veteran of the vice squad, homosexuals are arrested under the statute only when they are alone with an undercover police officer (JA 61), and usually after about 10 minutes of conversation of a general nature (JA 65-66). The same officer could not remember even one instance where a passerby was within earshot of a suggestion for "deviate sexual intercourse," (JA 142), and admitted that the solicitations at which Penal Law §240.35(3) is directed can be easily

(Footnote Continued)

to circumvent the decision in People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981). But commercial solicitation, a separate situation from that here, is dealt with by the entirety of article 230 of the Penal Law and by Penal Law §240.37 which outlaws loitering for the purpose of engaging in a prostitution offense. As implicitly conceded by the petitioner (Pet.Br. 19), use of the statute against Butler is an effort to avoid proving the commercial nature of a solicitation.

avoided by simply walking by when the initial "hi, how are you?" is uttered. (JA 74).

None of the testimony of the prosecution's six witnesses--three police officers, the owner of the Lenox Hotel, a local resident, and a nonresident Councilman--supports the conclusion that public harassment or nuisance results from the activities targeted by Penal Law §240.35(3).

The trial court made a number of assumptions about the character and dangers of homosexual solicitation that are unsupported by the record. Judge Drury hypothesized "[t]he real possibility that a man or his son may be solicited, harassed or confronted at the very door to his house." 111 Misc.2d at 409, 444 N.Y.S.2d at 377. But the record contains no evidence of unwanted,

noncommercial homosexual solicitation.³

The vice squad was unable to produce any evidence of citizen complaints about homosexuals accosting or propositioning them for non-commercial sex (JA 79),⁴ and the state's citizen witnesses testified that they had never been harassed, intimidated or even addressed by homosexuals, nor had they known of anyone in the neighborhood having been solicited

³The record contains evidence of only one uninvited offer from a male prostitute, which the witness found offensive because it was unwanted, not because it was homosexual. (JA 59).

⁴While one officer testified as to the general receipt of solicitation complaints, (JA 30) he did not distinguish between commercial as opposed to non-commercial solicitations, a distinction which the city court judge found pivotal. 111 Misc.2d at 408, 444 N.Y.S.2d at 376. Another officer testified that he did not know of, had not received, and had not read any complaints of homosexuals accosting anybody the past summer (JA 79), but that he vaguely remembered "maybe two or three" (JA 79).

by a homosexual, 111 Misc.2d at 408, 444 N.Y.S.2d at 376, let alone overheard any offensive conversation between homosexuals (JA 35,46). The vice squad officers denied receiving or even hearing of any complaints involving solicitation of children (JA 111,79). The only indication of uninvited non-commercial solicitation in the record was an officer's hearsay reference to one woman's complaint that her teenage son had been solicited (JA 19-20,113).

The record thus contains no evidence that homosexual solicitation for consensual, non-commercial sex either intrudes into the privacy of individuals or constitutes a public nuisance. In addition, no violence (JA 46,67), noise (44) or litter (44) was associated with this activity. The record demonstrates that men on the street, whether homosexual or not, do not congregate in

large fearsome groups or impede pedestrian traffic, but rather are often solitary and never in groups larger than three or four. (JA 38,43,51,78).

In sum, the record presents no basis for the proscriptions of §240.35(3). Instead, it shows that intrusive and unacceptable police tactics are being consistently used to punish a disfavored group, homosexuals, and to deter them from exercising their rights. The only basis for the statute's existence and enforcement is what the trial court described as the "age old fear that people have of homosexuals." 111 Misc.2d at 408-09, 444 N.Y.S.2d at 377.⁵

⁵The trial judge's active effort to create reasons to sustain the statute is further illustrated by examining his conclusion that "part of the opposition people have to [homosexuals] is due to the economic loss to businesses and to the value of their homes that occurs when

(Footnote Continued)

SUMMARY OF ARGUMENT

In its inception and application, Penal Law §240.35(3) is directed at homosexual solicitation based on a conclusive presumption drawn by the legislature that it is per se offensive and a public nuisance.

Amici examine first the historical precedents for such a presumption showing that the relationship between the legislature's effort to confine and stigmatize homosexuality today is an anachronism akin to the historic

(Footnote Continued)
[solicitation activity] takes place in an area," 111 Misc.2d at 409, 444 N.Y.S.2d at 377, despite testimony that business in the neighborhood was not adversely affected by the homosexuals (JA 48, Freudenheim). Judge Drury had remarked during argument that the witnesses "were too sensitive and tolerant to show...that their property was losing its value...and there was a substantial chance that their businesses would be affected" (JA 95).

prejudice and exclusion directed against Blacks, women, and the poor who likewise diverged from social norms.

Point II demonstrates the unconstitutionality of the statute under the first amendment. As illustrated by Uplinger's and Butler's arrest, the statute is triggered by pure speech and establishes a conclusive presumption that the speech is sufficiently harmful and invasive to override the expressional values at stake. On its face, Penal Law §240.35(3) thus violates the requirement that content-based restrictions must be tested in the individual case to determine whether the context of the speech justifies suppression. On the record, it is also clear that the expression for which Uplinger and Butler were arrested cannot survive the scrutiny required by the first amendment.

Point III discusses the sex-discriminatory nature of the statute's content-based restriction. Despite the fact that women endure and have been traditionally expected to endure heterosexual solicitation for both "deviate" and non-"deviate" sex that is generally unwelcome, loud, sexually explicit, and abusive, the statute prohibits as per se intolerable and offensive, homosexual inquiry which is characteristically discreet, non-explicit, invited, and easily ignored. This gender discrimination not only fails the substantial relationship test of equal protection, but underscores as well the impermissibility of the statute under the first amendment since the treatment of women makes clear that a far greater level of annoyance or offensiveness must normally be endured in public arenas.

Point IV examines the underinclusiveness and overinclusiveness of the statute, which further confirms that, at the root, the statute is directed against homosexuals, due not to the offensiveness of their solicitations, but to subjective apprehension for the "age-old fear" stirred by the presence of homosexuals in public.

Point V demonstrates that the solicitations at issue, far from being offensive per se, are shielded under the first and fourteenth amendments since the right of privacy and associational freedom necessarily entails public speech.

ARGUMENT

POINT I

PENAL LAW 240.35(3) PERPETUATES
DISCREDITED MORALISTIC
PRESUMPTIONS REMINISCENT OF
THOSE USED TO DEGRADE AND
EXCLUDE BLACKS, WOMEN AND THE
POOR

Penal Law §240.35(3) and the petitioner's assertion in this case that solicitation for "deviate" sex is patently offensive is a thin veil for impermissible prejudice against homosexuals. History teaches that this is the latest in a long and unfortunate line of moralistic proscriptions against those whose identity, lifestyle and/or intimacies are divergent from societal norms.

Under the guise of public morality and the protection of a well-ordered society, discrete groups have been told, often with the approval of the courts, to remain out of sight or in their "proper place". Lest this Court be intrigued into the same error, amici preface this brief with a few examples of previously sanctioned proscriptions which highlight the dangers and shortsightedness of enshrining prejudice into law. Mere

offense, distaste, or personal morality are unacceptable grounds upon which to restrict individuals in the exercise of important rights. Coates v. City of Cincinnati, 402 U.S. 611, 615 (1971).⁶

Racial Inferiority and Separation

The brutal system of slavery and the denial of citizenship to Blacks was rationalized by moral right and necessity. As Chief Justice Taney so

⁶The drafters of the Model Penal Code assert that statutes like §240.35(3) are not based on "private morality" but seek only to suppress "public nuisance." However, the drafters speak not of actual, concrete harm but only of the "flout[ing] of community standards;" the "affront to moral and aesthetic sensibilities;" and "annoyance." (Pet.Br. at 14 citing Model Penal Code, §251.3, Comment, at p. 476). Such phrases have long reflected the use of prejudice, stereotype and personal views of morality to justify oppression of minority groups. R. Abrams, Attorney General, Speech at New York University School of Law, reprinted in 5 Sex L. Rep. 21 (1979).

candidly and cruelly explained, Blacks "had for more than a century before been regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations....It was regarded as an axiom in morals as well as in politics, which no one thought of disputing..." Scott v. Sandford, 19 How. 393, 15 L.Ed. 691, 701 (1857).

Laws forbidding the marriage of whites and Blacks were jealously guarded on the ground that intermarriage was harmful to "good citizenship" and would adversely affect the "morals and civilization of a people." Naim v. Naim, 197 Va. 80, 86-88, 87 S.E.2d 749 (1955), appeal dismissed, 350 U.S. 985 (1956). In 1967, when this Court finally struck down such statutes, 16 states still punished miscegenation, apparently still believing that the downfall of

civilization would occur if intimacy between blacks and whites were permitted legitimation. Loving v. Commonwealth of Virginia, 388 U.S. 1 (1967). See also McLaughlin v. Florida, 379 U.S. 184 (1964).

Women's "Place"

The categorical prohibition against women entering and remaining in bars has a familiar ring: "That injury to public morality would ensue if women were permitted without restrictions to frequent wine rooms, there to be supplied with liquor, is so apparent to the average person that argument to establish so plain a proposition is unnecessary." Adams v. Cronin, 29 Colo. 488, 69 P. 590, 593 (1902), aff'd 192 U.S. 108 (1904). See also Goesaert v. Cleary, 335 U.S. 464, 466 (1948). Similarly here, petitioner considers the subject matter of Robert Uplinger's speech to be so

"undeniably lewd" (Pet.Br.8), and the injury to public sensibilities to be so manifest that no genuine evidence of concrete harm has been presented. See Point II, infra.

Bradwell v. Illinois, 83 U.S. (16 Wall.) 130,141 (1873) (Bradley, J., concurring) is often cited for its classic view that females have a "natural and proper timidity and delicacy" which "evidently unfits [them] for many of the occupations of civil life." For such reasons, women were, until 1850, excluded from teaching,⁷ and thereafter married women were widely excluded based on sentiments about their morally damaging and hazardous influence on school

⁷R. Callahan, An Introduction to Education in American Society, 383-84 (1956).

children.⁸ The prohibition on married women teaching gave way to forced maternity leaves,⁹ which this Court viewed as designed in part to insulate school children from conspicuously pregnant women. Cleveland Board of Education v. LaFleur, 414 U.S. 632, 641 n.9, 644-45 (1974). And recently, the Court has invalidated a variety of statutes on the basis that "[n]o longer is the female destined solely for the home and the rearing of family, and only the male for the marketplace and world of ideas." Stanton v. Stanton, 421 U.S. 7, 15 (1975), cited in Craig v. Boren, 429 U.S. 190, 198-99 (1976).

⁸I. Woody, A History of Women's Education in the United States, 509, 513 (1966); C. Atkinson and E. McLeska, The Story of Education, 346-47 (1965); Donovan, The School Ma'am, 57 (1938).

⁹Brief Amicus Curiae for the
(Footnote Continued)

Vagrancy

"Tramps," persons without homes or jobs, found wandering in a town have also been viewed as undesirables and therefore guilty of criminal conduct per se. Vagrancy statutes, such as that declared void by this Court in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) were at one time thought of "...as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds..." City of New York v. Miln, 36 U.S. (11 Pet.) 102, 142 (1837). The vagrancy laws served to secure the banishment of disfavored groups. Papachristou v. City of Jacksonville, 405 U.S. at 170. See also Edwards v. California, 314 U.S. 160,

(Footnote Continued)
National Education Association et al., in Cleveland Board of Education v. LaFleur, Sup. Ct. No. 72-777, at pp. 10-14 (1972).

177 (1941); Haring, Class Conflict and the Suppression of Tramps in Buffalo, 1892-1894, 1977 L. & Soc'y Rev. 873.¹⁰

Virtually any group which is considered a "moral pestilence" or acting in an "offensive" manner can be described as creating a public nuisance. But particularly where no harm can be shown which rises above that "existing only in the mind of the beholder," L. Tribe, American Constitutional Law §15-19, at 981 (1978), fundamental freedoms cannot be restricted.

¹⁰The Buffalo police department, responsible for the arrests of Uplinger and Butler, is the subject of an historical work describing control of "public order crimes" such as frequenting dance halls which were viewed as objectionable and immoral in the early 20th century. These crimes were seen as an effort to control the lifestyle of the working classes. See S. Haring, Policing a Class Society, 182-200 (1983): "The Buffalo police fully intended to socialize Buffalo's Italian community to 'proper American values.'" Id. at 199.

Like the laws enforcing racial inferiority, relegating women to a separate sphere, or excluding tramps from the streets, Penal Law §240.35(3) is a classification resting only on personal notions of morality, prejudice and stereotype. The lower court's view that "the appearance of homosexuals outside homes reinforces the age-old fear that people have of homosexuals and renews the offense they take at their activities," People v. Uplinger, 111 Misc.2d at 408-09, 444 N.Y.S.2d at 377, should be buried along with other infamous prejudices that this Court has rejected. It symbolizes

[a] mindless hysteria [which] has all too often taken over the legislative and electoral forums, a hysteria that is based on and fueled by people's ignorance and fear of those who are different....The state clearly has a legitimate interest in protecting its citizens from violence and other clearly defined harm....But justifications for discrimination against lesbians and gay men which are based on personal

sensibilities, prejudices, religious dogma, or unsubstantiated, unfounded and false presumptions are not compelling....[The] right to live one's life unhindered no matter how controversial or conventionally unacceptable that life style...is a central issue for racial, ethnic, and religious communities and for women. Intense opposition to all of these groups often focuses on the right of individual members to make personal life style decisions unacceptable to the majority....The underlying arguments...are that the social fabric of the country would be destroyed by legitimizing unsterotypical behavior or lifestyles. And the opposition to lesbian and gay men is ultimately based on a prejudice against a particular life style decision.

Speech, Robert Abrams, Attorney General of the State of New York, 5 Sex. L. Rptr. 21, 26 (1979) (emphasis added).

The petitioner's unsupported claims of harm to children, injury to businesses, embarrassment, discomfort, agitation and annoyance are based only on prejudices, rather than on the facts of clearly defined harms that Abrams recognizes as necessary to criminalize speech and associational activity.

Whatever the purported justification for despising homosexual persons, the imposition of criminal penalties based upon public sentiment abandons the commitment found in the Constitution to preserving the rights of minority populations.

Comments, Human Rights in an International Context: Recognizing the Right of Intimate Association, 43 Ohio St. L.J. 143, 152 (1982). See also McLaughlin v. State of Florida, 379 U.S. 184, 192 (1964).

POINT II

PENAL LAW §240.35(3) IS A
CONTENT-BASED PROSCRIPTION OF
SPEECH BASED ON AN UNFOUNDED
AND IMPERMISSIBLE PRESUMPTION
OF OFFENSIVENESS IN
VIOLATION OF THE FIRST
AMENDMENT

Penal Law §240.35(3) punishes pure speech based on the content of the speech simply because it occurs in a place frequented by the public. The fact that Uplinger was arrested not for remaining or wandering about in a public place, nor for inviting the undercover policeman "to

get high," People v. Uplinger, 111 Misc.2d 403, 406, 444 N.Y.S.2d 373, 375 (Buffalo City Ct. 1981), but only after he uttered certain words, makes clear that it was the content of his speech not his conduct which violated the law. See Cohen v. California, 403 U.S. 15, 18 (1971). Solicitation is a form of speech long protected under the First Amendment. See Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 628-634 (1980); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Thomas v. Collins, 323 U.S. 516 (1945); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939).

The state argues that the statute is permissible because the speech involved--a solicitation between unmarried people for oral or anal sex--is not protected under the first amendment. This Court is asked to hold that mere

utterance of certain sexually explicit words in public is per se offensive to community standards and a public nuisance irrespective of whether the circumstances amount to harassment, intimidation or disorderly conduct, whether the solicitee is unwilling, or whether any potentially offended individual overhears or is likely to overhear the solicitation.

The state appears to make two arguments: first that the speech involved is so worthless as to be unprotected; second that the harm to the public is so ineluctable and severe that a blanket prohibition is justifiable. Both must be rejected if first amendment values are to be preserved.

A. The Sexual Solicitation
At Issue Is Protected
Speech

First, the state fails to demonstrate that this speech is categorically unprotected. It cannot be

prohibited as valueless. Winters v. People of New York, 333 U.S. 507 (1948). Nor can it be prohibited as solicitation of criminal activity since oral sex among unmarried persons was not illegal in New York when the defendant was arrested.¹¹ Neither is it unworthy of protection because it involves a personal as opposed to a political exchange. Connick v. Meyers, __ U.S. __, 103 S.Ct. 1684, 1690

¹¹This Court has so far declined to address the constitutional merits of criminalizing sodomy. See People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981); Doe v. Commonwealth's Attorney, 403 F.Supp. 1199 (E.D. Va. 1975) aff'd without opinion, 425 U.S. 901 (1976). Whether or not this Court agrees with the New York Court of Appeals decision in Onofre is irrelevant here since the sexual conduct which Uplinger solicited was legal at the time of his arrest. Moreover, the validity of the Onofre decision is not challenged by the state here and should not be addressed by this Court given the absence of a record or determination below on this issue.

(1983). Merely because speech concerns what was traditionally viewed as "deviate" sexual conduct does not render it per se unprotected. Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962).

The state's position ignores the consistent teaching of this Court that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content...." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

In regard to more obtrusive or intrusive forms of speech than involved here, the Court has refused to countenance blanket content-based restrictions such as the one at issue. "Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." Police

Dep't of Chicago v. Mosley, 408 U.S. at 96 (1972). See also Widmar v. Vincent, 454 U.S. 263 (1981); Carey v. Brown, 447 U.S. 455 (1980); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).¹²

B. The First Amendment
Precludes the Categorical
Presumption of
Offensiveness At Issue
Here

As the dissenting Judge in the Court of Appeals, People v. Uplinger, 58 N.Y.2d 936, 940, 460 N.Y.S. 2d 514, 516 (1983) and the petitioner in its brief (Pet.Br.18) state, Penal Law §240.35(3) reflects a legislative presumption that solicitation for "deviate" sex is

¹²Indeed, the Court has prohibited content-based restrictions on speech, and other unreasonable regulations, even when the privacy of the home is at stake. See, Carey v. Brown, 447 U.S. 455 (1980); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Martin v. Struthers, 319 U.S. 141 (1943).

patently offensive.¹³ It requires neither scienter nor the demonstration of any harm, in the form of harassment, intimidation, disorderly conduct or breach of the peace before a conviction can be obtained. Indeed, as such, it violates the consistent teaching of this Court that pure speech--however offensive or frightening in itself--cannot be punished without examining the context in which it arises and the consequences it entrains.

¹³ Petitioner cites to a staff report considering revision of the New York Penal Law to prohibit solicitations to engage in both "deviate" and "normal" sexual acts. The committee viewed all such solicitations as "unsalutary or unwholesome from a social viewpoint." The state cites no authority to support its unfounded assertion that the legislature intended to limit the final act to solicitation for "deviate" sex because it is extra obtrusive, (Pet. Br. at 27), or to counteract the indication that the solicitation was criminalized merely because it was viewed as "unsalutary or unwholesome."

"The question in every case is whether the words used are used in such circumstance and are of such a nature as to create a clear and present danger that they will bring about the substantive evils [the legislature] has a right to prevent." F.C.C. v. Pacifica Foundation, 438 U.S. 726, 745 (1978) citing Schenk v. United States, 249 U.S. 47, 52 (1919). See also Police Dep't of Chicago v. Mosley, 408 U.S. at 101.

The need for individualized judicial determination as to whether the speech presents a sufficient degree of harm to justify suppression--a determination completely bypassed by Penal Law 240.35(3)--applies regardless of judicial or legislative attitudes toward the value of the speech involved. "Fighting words" are unprotected because they are uttered under circumstances likely to cause a breach of the peace. Chaplinsky v. New

Hampshire, 315 U.S. 568 (1942). Thus in Cohen v. California, the Court looked carefully at context rather than allow "one particular scurrilous epithet" to be excised from public discourse either because it was inherently likely to cause a violent reaction or because it offends the public morality. 403 U.S. 15, 22 (1971). Likewise advocacy of violence can only be suppressed when it is done in a context that constitutes "incitement to imminent lawless action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Here, the record reflects no more than an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." Cohen v. California, 403 U.S. at 23, citing Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508 (1969).

Even the determination that speech is obscene and, therefore, unprotected, results from a case by case determination, not from legislatively drawn presumptions. See Miller v. United States, 413 U.S. 15 (1973).¹⁴ Similarly, public displays of nudity are not categorically impermissible. See Erznoznick v. City of Jacksonville, 422 U.S. 205, 208 (1975). Surely, it is long past the day when it can be argued that public expression involving sexuality--even "deviate" sexuality--is

¹⁴New York v. Ferber, __ U.S. __, 102 S.Ct. 3348 (1982) upheld a prohibition on speech because the statute, drawn narrowly to protect children, was based on a factually supported determination that the "evil...so overwhelmingly outweighs the expressive interests." 102 S.Ct. at 3058. Here, the petitioner's claim to be protecting children from solicitation directed at grown men is mere bootstrapping. Other statutes do protect minors, both male and female, from sexual abuse by adults.

patently or presumptively obscene or offensive.¹⁵

Petitioner's effort to invoke the captive audience doctrine makes a mockery of the exception. The record makes clear that an unwilling passer-by can discourage a solicitation simply by refusing to respond to the salutation "hi" and that even a more explicit sexual suggestion can be likewise ignored.¹⁶

¹⁵Of particular relevance to this case is the Court's 1962 ruling in Manual Enterprises, Inc. v Day, 370 U.S. 478 (1962), which refused to treat as per se offensive photographs of male nudes which were found to appeal to the prurient interest of homosexual men.

¹⁶An empirical study of homosexual solicitation found that solicitations are generally extremely discreet. They are usually made by quiet conversation and gesture. When undercover police agents are used to make arrests, their partners are unable to get sufficiently close to witness the solicitation. Note, The Consenting Adult Homosexual and the Law: Empirical Study of Enforcement and Administration in Los Angeles County, 13 U.C.L.A. L. Rev. 643, 695 (1966).

There is absolutely no evidence, as the state contends, that an unwilling solicitee is forced to respond.

Unwilling solicitees are not like riders of a bus, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), but rather like the "passer-by who may be offered a pamphlet in the street but cannot be made to take it." Kovacs v. Cooper, 336 U.S. 77, 87 (1949).

Petitioner is reduced to the absurdity of claiming that the mere need to avoid an unwanted proposal or the "bother or genuine disturbance [felt by] those [claimed to be] involuntarily cast into the position of having to overhear them" (Pet.Br. 15-17) renders a person captive.¹⁷

¹⁷The argument is no more applicable to Butler's waving to passing cars than to Uplinger's discreet inquiries.

This is a far cry from the circumstances which have been held to constitute captivity, rendering one "practically helpless to escape this interference with...privacy." Kovacs v. Cooper, 336 U.S. at 87. Unlike F.C.C. v. Pacifica, 438 U.S. 726 (1978), where the Court emphasized the uniquely pervasive qualities of the broadcast media, its ability to invade the home, the time of day and resulting likelihood of exposing children to the offensive language, and the use of repetition to shock the listener, the statute at issue completely ignores the context of the solicitation. 438 U.S. at 748-750.¹⁸ Cf. Rosenfeld v. New Jersey, 408 U.S. 901 (1972) (Powell, J., dissenting).

¹⁸ Genuine harassment of a person who wishes to be left alone in a public place such as a park is punishable under other
(Footnote Continued)

The state purports to protect the privacy rights of the public on the streets. But the rare, avoidable, and unwanted inquiry suppressed by this statute is far from the intolerable invasion of privacy required to restrict speech and associational rights in public. Cohen v. California, 403 U.S. 15 (1971); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Hess v. Indiana, 414 U.S. 105 (1973).

Petitioner asserts that the state has a "compelling interest" in prohibiting the expression here because it constitutes a "public nuisance" inimical to the character of the neighborhood and successful business.

(Footnote Continued)
statutes. See e.g., N.Y. Penal Law §240.25 (McKinney 1980); N.Y. Penal Law §240.20 (McKinney 1980).

(Pet.Br. 20).¹⁹ But this Court has stressed that a claim of "nuisance," given its breadth and potential to suppress and sanitize public life, requires careful examination of the context of expression. F.C.C. v. Pacifica Foundation, 438 U.S. 726, 750 (1978); cf. Young v. Mini Theatres, 427 U.S. 50 (1976).

Mere assertions of offensiveness, moral disgust, or, at best, slight inconvenience--which is all the record in this case indicates--do not represent the careful analysis of the context which is required. Nor do they meet the test of intolerability and substantial invasion of privacy. First amendment values cannot be protected unless people are required to endure some offensive conduct

¹⁹ See supra fn. 5 at 9.

on the street, and to bear some burden of avoiding the distasteful.²⁰ The first amendment thus requires, at the least, case-by-case determination which is completely bypassed by Penal Law §240.35(3).²¹ For this reason, the

²⁰Point III, infra, discusses the gender discriminatory character of this statute in light of the fact that women are expected to endure far more sexually explicit, intrusive, abusive, unavoidable, and often threatening overtures from heterosexual men than anything suggested by this record. This only underscores that the alleged offense involved here is well within the scope of tolerability.

²¹It is furthermore clear that neither Uplinger's nor Butler's solicitation is punishable consistent with first amendment values. Uplinger's discreet inquiry occurred only after Nicosia had indicated, albeit falsely, that he was receptive. Butler was arrested for "waving to passing motorists during the early morning" after she was later found engaging in oral sex in a parked car. People v. Uplinger, 111 Misc.2d 876, 449 N.Y.S.2d 916, 919 (1982). There is no allegation that she was using sexually explicit language, nor that she impeded the ability of the cars

(Footnote Continued)

statute was and should be properly
invalidated on its face.²²

(Footnote Continued)

to avoid her overtures, nor that her solicitation had otherwise offended anyone. Indeed, petitioner virtually admits that it was her status as a "known prostitute" that led to her arrest and that Penal Law §240.35(3) was employed to circumvent the difficulty of proving the exchange of money essential to prosecution under the prostitution statutes. (Pet.Br.19). Moreover, it appears, as the lower court found, that §240.35(3) has been employed against prostitutes only since the Onofre decision to shield its anti-homosexual character and application. People v. Uplinger, 111 Misc. 2d 373, 404, 444 N.Y.S. 2d 373, 374 (Buffalo City Ct. 1981). For all these reasons, the statute is invalid as applied to respondent Butler.

²²Indeed the clear unconstitutionality of this statute and the unanimity of the state courts on the impermissibility of punishing non-criminal solicitation, Pryor v. Municipal Court of Los Angeles, 25 Cal.2nd 238, 599 P.2d 636 (1979); Commonwealth v. Sefranka, 414 N.E.2d 606 (Mass. 1980); Pederson v. City of Richmond, 219 Va. 1061, 254 S.E.2d 95 (1979); Cherry v. State, 18 Md. App. 252, 306 A.2d 634 (1973); Oregon v. Tusek, 52 Or. App. 997, 630 P.2d 892 (1981), even suggest the appropriateness of dismissing

(Footnote Continued)

POINT III

PENAL LAW §240.35(3)
CONSTITUTES A GENDER-BASED
SUPPRESSION OF SPEECH IN
VIOLATION OF THE FIRST AND
FOURTEENTH AMENDMENTS

While petitioner purports to deal with the underinclusiveness of Penal Law §240.35(3), he fails even to mention the gender-based discrimination effected by the statute. (Pet.Br.25-29). The claim that discreet homosexual solicitation is a patently offensive and intolerable invasion of the substantial privacy rights of individuals on the street¹ establishes protection for men that has been traditionally denied women.

Solicitation of women for both "deviate" and non-"deviate" sex by

(Footnote Continued)
the writ of certiorari as improvidently granted. See Phillips v. New York, 362 U.S. 456 (1960); Baldonado v. California, 366 U.S. 417 (1961).

heterosexual men is a commonly accepted practice:"...[T]he mere solicitation of illicit sexual intercourse from a woman is quite uniformly held not to amount to an assault." W. Prosser, Handbook of the Law of Torts, §10 n.20, at 40 (4th ed. 1971) (citations omitted).

Known as the doctrine of "no harm in the asking," this statement reflects prevailing tort principles governing purely verbal unwanted sexual invitations to females. By contrast, Penal Law §240.35(3) makes the asking criminal where the recipient is a man. It is ironic indeed that despite the ruggedness stereotypically assigned to the male in most areas of human endeavor, here the sensibilities and fears of men or their desire to be let alone are deemed in need of protection, while the stereotypically

fragile female is denied the same.²³ The constitutionally protected interest in personal privacy in these matters is obviously no greater for men than for women, and surely men can be deemed no less capable than women of ignoring solicitation or saying "no."

Nothing in the character of homosexual versus heterosexual solicitation justifies criminalizing the former and not the latter. While amici consider unwanted verbal solicitations of women short of harassment to be constitutionally protected albeit

²³ See, e.g., Bradwell v. Illinois, 83 U.S. 130 (1872); Goesaert v. Cleary, 335 U.S. 464 (1948); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981); and compare, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973); Stanton v. Stanton, 421 U.S. 7 (1975); Craig v. Boren, 429 U.S. 190 (1976).

annoying activity,²⁴ the facts demonstrate that homosexual inquiries are far less intrusive than heterosexual, non-"deviate" ones. Supra fn. 16.

The sexually explicit verbal harassment of women in public is ubiquitous.²⁵ These remarks--which are so frequent that hardly a woman or teenage girl has escaped them--certainly deserve judicial notice.²⁶ The abuse is

²⁴ Educational efforts may be desirable to reduce the social acceptability of unwanted verbal assaults on women; this is clearly not the business of the criminal law.

²⁵ Sexual abuse of this kind occurs everywhere in situations where the woman is clearly not interested in a sexual liaison with the harasser: jogging through the park, shopping in an upper class neighborhood, walking to work in the morning. See generally, Gardner, Passing By: Street Remarks, Address Rights and the Urban Female, 50 Sociological Inquiry 328 (1980).

²⁶ The litany is endless: "Hey, baby, want to fuck?", "Nice tits. Can I have
(Footnote Continued)

often loud and persistent, even when a woman has indicated her lack of interest or anger, Gardner, supra n. 25 at 346; Shear, Free Meat Talks Back, 26 J. of Comm. 38-39 (1976), and frequently conducted by groups of men, Gardner, supra n. 25 at 343, 348; King, The Good Ole Boy: A Southern Belle's Lament, Harper's Mag., April, 1974, at 78. It addresses the perceived physical characteristics of the woman, often commenting negatively or obscenely on a woman's appearance, Gardner, supra n. 25 at 333; Tax, Woman and Her Mind: The Story of Everyday Life, in Radical Feminism 23, 28 (1973). The remarks may

(Footnote Continued)

one?", "Look at that ass", "Come on, give me some." Women also commonly experience equally offensive solicitations for "deviate" sexual activity. The offense inheres, however, not in the particular sexual act described, but in the non-consensual nature of the verbal assault.

be vicious, especially if the woman refuses to respond or responds negatively, Gardner, supra n. 25 at 333; D. Russell, The Politics of Rape 168 (1975); Shear, supra; Tax, supra, at 28, and occur in a context of male violence against women. 27

Thus, in terms of public nuisance, or offensiveness to the individual in public, heterosexual solicitation of women is distinguishable from homosexual solicitation of men only by being worse. There is absolutely no rationality to protecting men in a context where women are not protected, let alone a substantial relationship to the

²⁷ See generally S. Brownmiller, Against Our Will (1975); C. MacKinnon, Sexual Harassment of Working Women (1979); D. Russell, The Politics of Rape (1975); L. Walker, The Battered Woman (1979); Burt & Estep, Apprehension and Fear: Learning a Sense of Sexual Vulnerability, 7 Sex Roles 511 (1981).

achievement of an important governmental objective. See Mississippi University for Women v. Hogan, __U.S.__, 102 S.Ct. 3331 (1982). Moreover, in the context of content-based restrictions, underinclusiveness destroys the presumption of statutory validity. See Erznoznik v. City of Jacksonville, 422 U.S. at 215.

Most importantly, the absence of any penalty on unwanted solicitation of women by heterosexual men for both non-"deviate" and "deviate" sexual activity ²⁸ demonstrates that the purpose

²⁸It should also be noted that although Penal Law §240.35(3) is theoretically susceptible of application against heterosexual male solicitation for "deviate" sex to non-spouses, the record fails to indicate any such application. Moreover, even this theoretical possibility cannot cure the facial discrimination in a statute which fails to address unwanted heterosexual non-"deviate" sexual solicitation.

of suppression here is not to protect against intolerable affront or public nuisance, but rather to punish and stigmatize homosexual men for their sexual orientation and subject them to intolerable invasion of privacy through prying and deceitful police tactics.

POINT IV

PENAL LAW §240.35(3), ON ITS FACE AND AS APPLIED, VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT IN THAT IT DISCRIMINATES AGAINST HOMOSEXUALS BASED ON THEIR STATUS AND NOT ON CONDUCT WHICH IS INJURIOUS TO OTHERS.

It is clear that, by origin and application, Penal Law §240.35(3) is directed to homosexual solicitation for non-commercial sexual activity. Its predecessor, Penal Law §722(8), also prohibited "soliciting," which was construed as "the asking, urging or importuning of a man or men to commit a

degenerate act," People v. McCormack, 9 Misc.2d 745, 747 (N.Y.Ct.Spec.Sess. 1957). This definition was applied to §240.35(3) when it was sustained by a lower court in People v. Willmott, 67 Misc.2d 709, 712 (N.Y.Justice Ct. 1971).

Prior to People v. Onofre, Penal Law §240.35(3) was enforced only against homosexuals. In Uplinger, the city court found that the recent effort, represented by the Butler case, to apply it to heterosexual solicitation, is "an attempt to circumvent the effect of the Onofre decision." People v. Uplinger, 111 Misc.2d 403, 404, 444 N.Y.S.2d 373, 374 (Buffalo City Ct. 1981).²⁹ Thus, this

²⁹ While amici do not accept that the commercial nature of a sexual exchange justifies criminalization of prostitution or solicitation regarding it, that is not the issue in this case. The issue here is rather the validity of applying §240.35(3) to conduct for which it was

law is directed at non-commercial sexual solicitation by homosexuals.

As the record shows, the character of homosexual solicitation with respect to the possibility of an unwanted approach to a stranger, or offense to public morality or sensibility, does not justify the distinction between homosexual and heterosexual solicitation. Section §240.35(3) is not on the books because unreceptive men are being approached or because bystanders are being subject to overhearing explicit

(Footnote Continued)
not intended and for the purpose of punishing the status of appearing to be a prostitute notwithstanding that the crucial commercial exchange cannot be proven. (Pet. Br. 19) That ample laws exist to control the offense of prostitution only underscores that the target of this statute is homosexuals. See Penal Law §230.25(loitering for solicitation for prostitution), §240.20 (disorderly conduct), §230.25 (harassment) and §100 (solicitation for criminal conduct).

sexual discussion.³⁰ The offense to the public complained of by petitioner is equally "committed" by two homosexual men talking softly on the street about politics as it is by the speech that triggered Uplinger's arrest.

Moreover, if the law were genuinely concerned with unwanted or offensive solicitation, then it would not apply to public places such as gay bars, restaurants and other public places where homosexuals and their friends go with the

³⁰ Petitioner's effort to justify the exclusion of married couples from the statute further demonstrates that it is based not on the type of sex but on the appearance of those discussing it. While it is true that a solicitation between spouses cannot involve a stranger, it can be overheard by strangers just as easily as a homosexual interchange. Indeed, just as heterosexuals are far more physically sexual with one another in public than are homosexuals, so also it is predictable that spouses might discuss their sexual desires with less caution about being overheard.

expectation that solicitation is a normal part of social intercourse, and where there is no "public" capable of being offended. The city court, however, made clear that direct offense is irrelevant because of the most amorphous notion that offense attaches "wherever it occurs." People v. Uplinger, 111 Misc.2d at 409, 444 N.Y.S.2d at 377.

Finally, if the law were genuinely concerned with unwanted solicitation, then enforcement practices would be considerably different. Rather than setting up decoys whose job it is to elicit invitations for explicit forms of "deviate" sexual activity, enforcement would be oriented toward spotting the actually undesired solicitation and questioning the seemingly offended party. Given the discretion with which these solicitations are conducted by the homosexual community on North Street,

however, it is obvious that such a scenario would be rare indeed and would not warrant the law enforcement effort required.

Upon analysis, the law emerges as nothing more than an effort to punish the status, the appearance on the street, and the social intercourse of homosexual men. Stripped to its essentials, this statute impermissibly punishes a group because their intimacies and life-styles are offensive to some members of the public. Coates v. City of Cincinnati, 402 U.S. 611, 615-16 (1971); U.S. Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)³¹.

³¹By contrast, if singles bars and beaches were infiltrated by undercover officers who snared heterosexuals engaged in the process of finding lovers, public outcry would be deafening, bearing out the truth of Justice Jackson's reminder that "there is no more effective

(Footnote Continued)

POINT V

PENAL LAW §240.35(3) INFRINGES
THE FUNDAMENTAL RIGHT TO MAKE
PERSONAL DECISIONS ABOUT
PRIVATE CONSENSUAL
NON-COMMERCIAL SEXUAL ACTIVITY
AMONG ADULTS

Amici rely on the arguments of respondents and other amici, which--although not necessary for the resolution of this case--assert that consenting adults are protected from unwarranted government intrusion into their right to make decisions about private sexual conduct. Griswold v. Connecticut, 381 U.S. 479 (1965). In addition, amici note that this right of privacy has certain public aspects that are also protected. See Carey v.

(Footnote Continued)
practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally," Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

Population Services Int'l., 431 U.S. 678, (1977); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809, (1975).

If public commercial advertising of matters related to protected sexual intimacies--viewed as "obscene" and "offensive" by some--is protected, then, a fortiori, discreet, individualized inquiry to ascertain interest in establishing a non-commercial, consensual sexual relationship is well within the scope of the constitutional right to privacy. "This is so not because there is an independent fundamental 'right of access [e.g.] to contraceptives,' but because such access is essential to the exercise of the constitutionally protected right of decision...." Carey v. Population Service Int'l. 431 U.S. at 688.

EAGLE-A

If homosexuals or, theoretically, unmarried heterosexuals are to be denied the right of social intercourse when they are on the public streets, on public property, or in places of public accommodation, as Penal Law §240.35(3) provides, then the right to engage in private in constitutionally protected consensual sexual activity will be severely burdened. To so limit the ability to form human and sexual relationships is no less unconstitutional than a complete prohibition on the protected conduct. Carey v. Population Services, Int'l., 431 U.S. at 689-90.

The damage done to the right of privacy by §240.35(3) is underscored by the particularly intrusive methods adopted by the police to enforce its prohibition. The statute gives the police license to target "suspected homosexuals," spy on their peaceful

activities and delve into highly intimate, personal areas of their lives. The police are not passive, but engage in activity designed to lead individuals to reveal their sexual preference generally as well as their interest in specific sexual practices. Similar police practices have been described as

"mock[ing] the dignity of both offenders and enforcers. Surely police have more pressing duties than to search out adults who live a so-called 'wayward' life....More importantly, the liberty which is the birthright of every individual suffers dearly when the State can so grossly intrude on personal autonomy." State v. Saunders, 75 N.J. 200, 220 (1977). See also Griswold v. Connecticut, 381 U.S. at 485-86.

Here, respondent Uplinger may have been speaking with a complete stranger on the street, but he was entitled to feel assured that he was not divulging intimate details about his life to a government agent.

Intimate human relationships depend largely on the sense that the participants are free from the observations of others, and that

sense is essential to the development of individual points of view and modes of life. Continuing contacts with those looking for damaging information are both highly unpleasant and disturbing to any sense of security.

People v. Collier, 376 N.Y.S.2d 954, 982 (N.Y. Sup. Ct. 1975) (quoting Prof. Kent Greenawalt in The Right of Privacy, in The Rights of Americans, 300).

Unlike the quite tolerable minor invasion of privacy which in theory might result from an undesired sexual solicitation, the invasion of privacy resulting from police spying into intimate aspects of human relationships is far more injurious and intolerable to the individual and in fact to the health and well-being of our entire society.

CONCLUSION

For all the foregoing reasons, Penal Law §240.35(3) must be invalidated on its face and as applied.

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No. 82-1724

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW YORK,

—vs.—

ROBERT UPLINGER,

Petitioner,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

**MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF
THE COMMITTEES ON SEX AND LAW, CIVIL RIGHTS,
CRIMINAL LAW, AND CRIMINAL COURTS OF THE AS-
SOCIATION OF THE BAR OF THE CITY OF NEW YORK
ON BEHALF OF RESPONDENT UPLINGER**

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**MOTION OF THE COMMITTEES ON SEX AND LAW,
CIVIL RIGHTS, CRIMINAL LAW AND CRIMINAL
COURTS OF THE ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE**

The Committees on Sex and Law, Civil Rights, Criminal Law and Criminal Courts of the Association of the Bar of the City of New York respectfully move for leave to file the attached brief as *amicus curiae*. The respondents, but not the petitioner, have consented to the filing of this brief.

The Association of the Bar of the City of New York (hereinafter "the Association"), chartered by the State of New York in 1871, is an organization of about 14,000 lawyers practicing or resident in the New York City metropolitan area. The Association has had a long-standing commitment to

criminal law reforms and to the principle of individual liberty including the reasonable expectation of privacy. The Association's commitments to these broad goals have been demonstrated by the filing of *amicus* briefs, testimony before legislative bodies, publication and dissemination of reports, and the issuance of public statements. The Association conducts its work through committees. The committees with jurisdiction in respect of the subject matter of this appeal, the Committees on Sex and Law, Civil Rights, Criminal Law and Criminal Courts (hereinafter "the Committees"), have joined together and been authorized by the Association to file this brief.

The Association, through its committees, has a deep interest in the decision of the New York Court of Appeals below, which is based on *People v. Onofre*, 51 N.Y.2d 476 (1980), *cert. denied*, 451 U.S. 987 (1981). The Association filed an *amicus* brief with the New York Court of Appeals in *Onofre*, urging the court to find the New York consensual sodomy statute, New York Penal Law § 130.38, unconstitutional.

The particular concern of the Committees, as demonstrated in the attached brief, is with the facial unconstitutionality of the challenged statute and the application of the constitutional right of privacy as developed by this Court. This appeal presents the question of the relationship between the state's police power and the constitutional rights of privacy and freedom of expression and association. Because the Association, through its committees, has long been concerned with these issues, it is in a unique position to speak out on their resolution in this case. The Committees believe that the constitutional issues are best addressed in the context of the arrest and conviction of Robert Uplinger, because the facts concerning the arrest and conviction of Susan Butler present additional complicated questions about prostitution and whether particular sexual acts performed in a parked car are taking place in public. Consequently, the Committees wish to address only the Uplinger prosecution, and limit their brief to that case.

Counsel for both Respondents gave their assent to the Committees' request for permission to file an *amicus* brief. Because the petitioner has refused to consent, the Committees respectfully move for leave to file the attached brief as *amicus curiae* with respect to the Uplinger case.

Respectfully submitted,

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**BRIEF AMICUS CURIAE OF THE COMMITTEES ON SEX
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CRIMINAL COURTS OF THE ASSOCIATION OF THE
BAR OF THE CITY OF NEW YORK ON BEHALF OF
RESPONDENT UPLINGER**

The Committees on Sex and Law, Civil Rights, Criminal Law and Criminal Courts of the Association of the Bar of the City of New York (hereinafter referred to respectively as "The Committees" and "The Association") hereby submit their brief *amicus curiae* pursuant to Rule 42 of the Rules of the Supreme Court. The Committees' brief is in support of the position taken by the respondent Robert Uplinger. A motion requesting permission to file this brief is submitted simultaneously herewith, counsel for petitioner having denied consent to file. Consent was given by counsel for respondents Uplinger and Butler.

INTEREST OF AMICUS

The Association has had a long-standing commitment to criminal law reforms and to the principle of individual liberty including the reasonable expectation of privacy. The Association's commitments to these broad goals have been demonstrated by the filing of *amicus* briefs, testimony before legislative bodies, publication and dissemination of reports, and the issuance of public statements. There are currently about 14,000 members of the Association and approximately seventy standing committees which conduct most of the Association's substantive work. Several standing committees of the Association have taken an active part in the drafting, editing or consideration of filing of this brief. The Executive Committee of the Association has authorized the filing of this brief by the Committees.

This brief is submitted because the Association, through the work of the Committees, recognizes that important issues of fundamental fairness and privacy affecting citizens of the State of New York as well as all citizens of the United States may be reached by this Court's consideration of this case. The federal constitutional right of privacy, as it relates to consensual, sexual activity among adults acting in private, is an issue implicated herein. Consequently, the Committees wish to present their views as *amicus curiae* in support of the decision reached below by the New York Court of Appeals.

PRELIMINARY STATEMENT

On August 7, 1981, Robert Uplinger was walking on a sidewalk near his home in Buffalo, New York, very late at night. He encountered Steven Nicosia and they engaged in friendly conversation, during which Uplinger introduced Nicosia to other men who were walking on the sidewalk. When some police officers ordered the men standing on the sidewalk to disperse, Uplinger invited Nicosia to return to Uplinger's home to engage in sexual activity. Nicosia, an undercover

police officer, arrested Uplinger for violating New York Penal Law § 240.35-3, which prohibits loitering or remaining in a public place "for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature." Petitioner's Brief, at 4. In 1980, New York's Court of Appeals had found the New York law criminalizing "deviate sexual intercourse" to be unconstitutional in *People v. Onofre*, 51 N.Y.2d 476, and this Court had denied a petition for a writ of *certiorari* in May, 1981. 451 U.S. 987. Thus, the act which Uplinger suggested was lawful at the time of the conduct in this case.

Uplinger was convicted, and on appeal the County Court affirmed the conviction. Petitioner's Brief, at 6. New York's Court of Appeals granted leave to Uplinger to appeal, and his case was consolidated for argument with that of Susan Butler, an individual who had been tried under the same statute under different factual circumstances. Petitioner's Brief, at 4-6. Before the Court of Appeals, both Uplinger and Butler argued that Penal Law § 240.35-3 was unconstitutional. The Court of Appeals, in a short memorandum decision, held that the statute suffered from the same constitutional infirmities as the consensual sodomy statute which had previously been held unconstitutional in *Onofre*. *People v. Uplinger*, 58 N.Y.2d 937, 937-38 (1983). Consequently, the statute was held unconstitutional.

PERTINENT STATUTORY PROVISIONS

New York Penal Law, § 240.35 Loitering

A person is guilty of loitering when he:

. . .

3. Loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature. . .

New York Penal Law, § 240.00 Offenses against public order; definitions of terms

The following definitions are applicable to this article:

1. "Public place" means a place to which the public or a substantial group or persons has access, and includes, but is not limited to, highways, transportation facilities, schools, places of amusement, parks, playgrounds, and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence.

. . . .

New York Penal Law, § 130.00 Sex offenses; definitions of terms

The following definitions are applicable to this article:¹

. . .

2. "Deviate sexual intercourse" means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva.

SUMMARY OF ARGUMENT

New York Penal Law § 240.35-3 is facially unconstitutional. It is so sweeping that it penalizes the most discreet invitations, if made in a "public place," to engage privately in certain types of sexual conduct which the New York Court of Appeals had

¹ The term "deviate sexual intercourse" as used in § 240.35-3 is not defined anywhere in the New York Penal Law other than in § 130.00-2. Despite the implication in the introductory sentence of § 130.00 that the definitions contained therein only apply to the sex offense provisions in Article 130, § 130.00-2 provides the only statutory definitional source for a New York court called upon to construe § 240.35-3.

previously held were constitutionally protected. As construed by the New York Court of Appeals, the challenged statute lacks any requirements that the solicitation "be in any way offensive or annoying to others." 58 N.Y.2d at 938. The most intimate conversations are therefore within the reach of this statute. As such, the challenged statute impermissibly and overly broadly restricts individual rights and liberties protected by the First and Fourteenth Amendments of the United States Constitution, including the rights of free speech, privacy, association, due process and equal protection. The statute deserved the summary repudiation it received from New York State's highest court.

ARGUMENT

I. The Challenged Statute Is Facially Unconstitutional Because It Abridges Rights Protected by the First and Fourteenth Amendments of the United States Constitution.

Section 240.35-3 ("the statute") is facially unconstitutional. First, it penalizes free speech and association rights protected by the First Amendment in an overly broad manner not justified by any legitimate state interest. Second, the statute offends due process because it vests undue discretion in the police, prosecutors, judges and juries to define prohibited conduct according to their personal predilections. Additionally, by singling out particular groups for disparate treatment, without any rational basis for the distinction, the statute deprives unmarried or homosexual citizens of equal protection of the laws. In construing the statute, the New York Court of Appeals held that it was not susceptible to a narrowing interpretation which might save it from constitutional challenge.² Consequently, the statute as a whole is unconstitutional.

² The three-paragraph Court of Appeals decision refers to § 240.35-3 as a "companion statute" to § 130.38 (the consensual sodomy statute) and concludes that the loitering statute "suffers from the same deficiencies as did the consensual sodomy statute," 58 N.Y.2d at 937,

A. The Conduct At Issue Is Essentially Speech and Entitled To First Amendment Protection.

The statute sweeps too broadly. It penalizes speech as well as conduct, and is so sweeping that even a whispered invitation in a bar to a person of the same or opposite gender to engage in private oral sex would fall within its scope.

This Court has repeatedly held that a challenge to the facial unconstitutionality of a statute on First Amendment grounds may be withstood by the state only if the statute is *not* susceptible of application to protected speech. *Lewis v. New Orleans*, 415 U.S. 130, 134 (1974); *Gooding v. Wilson*, 405 U.S. 518, 520 (1972); *Cohen v. California*, 403 U.S. 15, 18-22 (1971); *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949). While it is true that the statute purports to regulate the *conduct* of remaining in a public place with the intention of soliciting certain sexual conduct, that intention can only be expressed by

which the Court of Appeals struck down in *Onofre*. In its brevity, the *Uplinger* decision suffers, however, from ambiguity and imprecision. It is unclear from the opinion whether the court's holding is based on privacy considerations; other First Amendment considerations, such as speech or associational rights; due process considerations; or whether the statute was viewed as so inextricably intertwined with the *Onofre* "companion statute" that it too must fall. It is even unclear whether the decision was based on the state or federal constitutions, or both. Indeed, this Court may conclude that the significant constitutional issues implicated in this case are "not presented with clarity, precision and certainty," *Rescue Army v. Municipal Court*, 331 U.S. 549, 576 (1947), so as to enable this Court properly to decide the case. See *Minnick v. California Department of Corrections*, 452 U.S. 105, 122-27 (1981); *Cowgill v. California*, 396 U.S. 371 (1970); *Michigan v. Oregon Frozen Foods Co.*, 361 U.S. 231 (1960); *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948). The granting of a writ of certiorari in a case where the decision below is opaque as to the reasoning for its holding is a matter of particular concern to counsel, who are left to speculate as to the issues in the case which were of sufficient concern to cause this Court to grant the writ. The Association of the Bar, as representative of the interests of many New York lawyers, is concerned that the decision of important constitutional issues not be undertaken in a case where counsel's preparation may be of necessity inadequately informed as to the issues of concern to this Court.

speech. Thus, the statute as applied and on its face criminalizes speech. Indeed, Robert Uplinger was arrested for a statement that he made privately to an undercover police officer, while they were standing on a sidewalk late at night.

It has long been established that laws restricting the act of solicitation implicate First Amendment concerns. In *Thomas v. Collins*, 323 U.S. 516 (1945), this Court held that solicitation—in that case, speech encouraging individuals to join a labor union—was constitutionally protected speech, and that attempts to restrict such speech “must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger.” *Id.*, at 530. *Accord*, *Schaumburg v. Citizens For A Better Environment*, 444 U.S. 620 (1980); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976). *And see*, *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 147 (1939). That the speech in this case has to do with private rather than political concerns does not take it outside the scope of First Amendment protection. *Connick v. Myers*, ___ U.S. ___, 103 S.Ct. 1684, 1690 (1983). In *Connick*, this Court stated:

We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the state can prohibit and punish such expression by all persons in its jurisdiction.

Id., at 1690. Solicitation to engage in lawful sexual activities in private raises the same First Amendment concerns, as noted by the highest courts of California and Massachusetts in evaluating the constitutionality of criminal statutes dealing with homosexual solicitation. *Pryor v. Municipal Court of Los Angeles*, 158 Cal.Rptr. 330, 599 P.2d 636 (1979); *Commonwealth v. Sefranka*, 414 N.E.2d 602 (Mass.Sup.J.Ct. 1980). Under these standards, it is clear that Uplinger’s speech, and similar discreet sexual solicitation, is constitutionally protected, and that the challenged statute’s attempt to penalize it impermissibly abridges First Amendment rights. This Court

has identified only a few categories of speech which are not constitutionally protected: (1) speech which poses a clear and present danger of imminent violence or breach of the peace (*Terminiello v. Chicago*, 337 U.S. 1 (1948); *Feiner v. New York*, 340 U.S. 315 (1951)); (2) speech which is obscene or constitutes "fighting words," calculated to provoke an immediate violent response from the hearer (*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)); and (3) speech which advocates criminal activity (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)). Uplinger's sexual solicitation of the undercover police officer fits in none of these unprotected categories.

Uplinger's remarks did not pose a clear and present danger of imminent violence or breach of the peace. They did not even involve ostentatious behavior. He had engaged the police officer in friendly conversation and the context gave him reason to believe that the officer would be receptive to a polite solicitation; indeed, the creation of such a belief is of the essence of undercover vice squad operations. See, e.g., *Pryor v. Municipal Court*, *supra*, 599 P.2d at 644 nn. 7, 8. However, the statute is broadly worded to criminalize *all* solicitations made in a public place, regardless of whether a clear and present danger of breach of peace exists. Indeed, although § 240.35-3 is contained in Article 240, titled "Offenses Against Public Order," the Practice Commentary printed in the official publication of the New York Penal Law, 39 McKinney's Consolidated Laws of New York Annotated (1980), states: "This type of conduct, clearly of a 'loitering' nature, has little or no tendency to create public disorder or alarm." *Id.*, at 316.³ The Court of Appeals also construed the statute as omitting any requirement that the proscribed conduct "be in any way offensive or annoying to others" and, therefore, "the challenged statute cannot be categorized as a harassment statute." 58 N.Y.2d at 938.

³ The author of the commentary is identified as former Counsel to the Commission on Revision of the Penal Law and Criminal Code of New York. *Id.*, at iii.

Neither did Uplinger's remarks constitute "fighting words" or obscenity. The "fighting words" doctrine applies to "situations in which personally abusive epithets are used in a face-to-face confrontation," Comment, "Sticks and Stones: Homosexual Solicitations and the Fighting Words Doctrine," 41 Ohio St. L.J. 553, 572 (1980), and in which the words themselves "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Lewis v. New Orleans*, *supra*, at 133, but not, as here, to discreet invitations where the object is sexual intimacy. However, the statute irrationally criminalizes even the most subtle, innocuous and discreet sexual invitation. See, *Pryor*, *supra*, 599 P.2d at 644 n.7. It is in the nature of a sexual solicitation to be discreet and and friendly, because the intention and hope of the solicitor is obviously to secure a favorable reponse. Furthermore, prosecutions based on citizen complaints or disruptions of public order are rare, with arrests normally based on the testimony of police "decoy" solicitees. Note, "There May Be Harm In Asking: Homosexual Solicitations and the Fighting Words Doctrine," 30 Case West. Res. L.Rev. 461, 486 (1980). Indeed, cases concerning the enforceability of solicitation laws against homosexuals invariably involve solicitations of plain-clothes police investigators rather than complaining citizens. Consequently, the likelihood that the typical sexual solicitation would provoke a violent response is so remote that it would be difficult to justify a sweeping prohibition of otherwise protected speech merely to avoid such an unlikely response.

Neither could a discreet homosexual solicitation be considered "obscene." Uplinger's statement was an invitation to an apparently willing listener to engage in lawful activities in private. While Uplinger's language might be characterized as "explicit" or "crude," it had a communicative purpose. Furthermore, with respect to facial constitutionality, the statute does not require that the words in which the solicitation is made be themselves obscene; it penalizes a solicitation made in language so circumspect that only a listener attuned to hear the invitation buried in circumlocution would even know a solici-

tion was taking place. Under § 240.35-3, a polite and friendly invitation to "come home with me and have some fun" would be unlawful if the intention of the solicitor included the possibility of sexual activities described in the statute.

Finally, Uplinger's speech, which conveyed an invitation to engage in sexual activity in his home, did not advocate criminal activity. At the pertinent time, the activity solicited was lawful in New York. *People v. Onofre, supra*.

B. The State Has Not Demonstrated A Compelling Interest In Regulating The Speech At Issue.

Because Uplinger's speech was entitled to First Amendment protection, a statute which would punish such speech without a compelling justification is facially unconstitutional. The broad sweep of the statute is also pertinent to the First Amendment inquiry, because, having concluded that the speech is constitutionally protected, only a statute narrowly drafted to meet a compelling state interest may withstand the required strict scrutiny. However, the challenged statute is neither narrowly drafted to meet a compelling state interest nor drafted with such specificity that inadvertant chilling of protected activity is avoided.⁴

The interest articulated by the prosecutor with respect to this statute is "the suppression of public nuisance." *People v. Uplinger, supra*, 58 N.Y.2d at 940 (dissent), quoting Model Penal Code, § 251.3, Comment, at 476. However, the majority of the New York Court of Appeals expressly held that "the challenged statute cannot be categorized as a harassment statute." 58 N.Y.2d at 938. Thus, the statute goes far beyond suppressing a "public nuisance." There are other New York

⁴ If this Court concludes, as it did in *Hoffman Estates v. Flipside*, 455 U.S. 489 (1982), that some of the statute's hypothetical applications are not facially invalid, then the case should be remanded to the Court of Appeals for specific consideration of a construction of the statute which would adequately protect the First Amendment, due process and equal protection rights of citizens.

Penal Law provisions not challenged here which deal with offensive behavior, disorderly conduct, or harassment (N.Y. Penal Law §§ 240.20, 240.25), and which adequately serve to protect the state's interest in those cases where the solicitor's behavior might create a genuine public nuisance or immediate threat to good order. With those other provisions on the books, however, all that is *added* by the challenged statute is the prohibition of those solicitations which do not create a public nuisance. The prevention of such solicitation, consequently, is not required to satisfy the interests articulated by the state. As the Court of Appeals correctly observed, "the statute itself is devoid of a requirement that the conduct proscribed be in any way offensive or annoying to others." 58 N.Y.2d at 938.

The statute is also impermissibly broad in its wide-ranging prohibition of all such solicitation in a "public place," where that term is broadly defined. See New York Penal Law § 240.00-1. As noted by the California Supreme Court in *Pryor, supra*, the mere fact that such a solicitation takes place in public does not automatically establish the state's right to punish it, because in the "context" it may be inoffensive. 599 P.2d at 644. Thus, in such "public places" as "singles bars" or "gay bars," such speech may be expected and welcome by those in attendance, and the public order concerns articulated by the state would appear irrelevant in those settings, even though they are undoubtedly "public places." However, the statute as it now reads would penalize such speech regardless of its appropriateness to the "context." The statute has not been construed by the New York courts in a way which would preserve the constitutional rights of citizens consistent with legitimate state interests.

C. The Statute Also Violates Due Process Protections.

The statute is also defective on due process grounds due to its vagueness. "Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [vagueness]

doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1973). However, the challenged statute not only prohibits engaging in or soliciting "deviate sexual intercourse," a term which is carefully defined by the legislature (N.Y. Penal Law § 130.00-2), but extends such prohibition to "other sexual behavior of a deviate nature," a phrase which is not statutorily defined either in whole or as to its constituent parts. As a matter of statutory construction, the latter phrase must refer to unspecified conduct not included within the definition of "deviate sexual intercourse," but the individual is left to speculate as to what conduct is meant to be included. As such, the statute does not give fair notice to the individual of what speech or conduct is forbidden, and gives undue discretion to police officers, judges and juries to impose their personal views of what is appropriate sexual conduct upon defendants, rather than providing an objectively determined standard as required by law. *Kolender v. Lawson*, 103 S.Ct. 1855, 1858-61 (1983); *Smith v. Goguen*, *supra*, at 572-73; *Pryor*, *supra*, 599 P.2d at 644, 647; *Commonwealth v. Sefranka*, *supra*, at 604.

Even the question whether particular behavior is considered "sexual" may well depend upon the experiences and social conditioning of the individual. But the characterization of particular behavior as "deviate" is particularly problematic; sex research has placed into serious question the appropriateness of labeling even those activities defined in Penal Law § 130.00-2 as "deviate." See, e.g., A.C. Kinsey, W.B. Pomeroy, & C.E. Martin, *Sexual Behavior in the Human Male* (1948); A.C. Kinsey, W.B. Pomeroy, C.E. Martin & P.H. Gebhard, *Sexual Behavior in the Human Female* (1953); P. Blumstein & P. Schwartz, *American Couples* (1983). Blumstein and Schwartz, in their study of American couples, found that only about ten percent of the heterosexual (both married and unmarried) couples in their study sample of several thousand had never engaged in sex of a type described in Penal Law § 130.00-2, and that sexual satisfaction as a binding force in keeping couples together correlated highly with the practice of

oral sex as part of a relationship. Blumstein & Schwartz, *supra*, at 231-37. Clearly, characterization of any particular consensual sexual activity as being "deviate" impermissibly depends on the "personal predilections" of individuals in the law enforcement and criminal justice systems. *Kolender, supra*, at 1858-59. Thus, by extending the statutory prohibition beyond the precisely defined phrase "deviate sexual intercourse" to conduct which is described by language which is unduly vague because "there is no commonly accepted understanding of the quoted terms," *Sefranka, supra*, at 604, the state impairs the ability of individuals to conform their conduct to the law. The 90% of heterosexual couples found by Blumstein & Schwartz to have engaged in such acts would be surprised to learn that their behavior is considered to be the deviation from the norm.

Aside from the vagueness of the statute, there is a further due process problem with its application to the particular case of Robert Uplinger. The activity which formed the basis of his conviction occurred two years after the well-publicized New York Court of Appeals decision in *Onofre* striking down the consensual sodomy statute. Thus, Uplinger could reasonably have expected that his discreet invitation to another adult to engage in protected activity in his home was not conduct which could conceivably be criminal, particularly since, as the Court of Appeals held, the statute did not require that the prohibited conduct "be in any way offensive or annoying to others." 58 N.Y.2d at 938. While this statutory interpretation followed Uplinger's action, no reasonable interpretation of the conversation at issue between Uplinger and the police officer could lead to the conclusion that it was harassing. Thus, Uplinger's conviction must be set aside on the ground that the prior *Onofre* decision gave him a fair expectation that the conduct prosecuted here was entirely protected.

D. The Statute Also Violates Equal Protection Rights.

The challenged statute also violates the constitutional requirement of equal protection of the laws contained in the Fourteenth Amendment, because it allows married individuals

to engage in public solicitation of each other to engage in the conduct defined as "deviate sexual intercourse," regardless of the existence of the same factors with respect to them as the state relies upon in justifying the application of the statute to unmarried individuals. If the purpose of the statute is to prevent a public nuisance in the form of harassment or public disorder, there is no rational basis for drawing such a distinction. A husband might solicit his wife to return home to engage in "deviate sexual intercourse" in a manner which harasses his wife or is calculated to provoke onlookers into a violent reaction, and the interest, if any, of the state would be just as strong in preventing such an occurrence in public as it might be with respect to unmarried couples. *Cf.*, *Onofre, supra*, 51 N.Y.2d at 491-92.

Indeed, the statute as phrased lends itself to discriminatory enforcement not only against unmarried heterosexual couples, but especially against homosexuals. In restricting the permissible scope of a similar California statute, the California Supreme Court noted that such laws lend themselves to invidious discriminatory enforcement against homosexuals. *Pryor, supra*, at 644 n.8. A statute which is primarily used to harass and chill the speech, associational and privacy rights of a "discrete and insular minority," *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938), is constitutionally suspect in the absence of a compelling state interest. Homosexuals bear all of the characteristics of such a minority. E. Chaitin and V.R. Lefcourt, "Is Gay Suspect?", 8 Lincoln L.Rev. 24 (1973); M.C. Dunlap, "The Constitutional Rights of Sexual Minorities: The Crisis of Male/Female Dichotomy," 30 Hastings L.J. 1131, 1145-47 (1979); D.A.J. Richards, "Sexual Autonomy and the Right to Privacy," 30 Hastings L.J. 957, 987 n.130 (1979). Consequently, the statute violates the rights of both homosexuals and unmarried heterosexuals without any rational basis or state interest to justify the differential treatment.

II. The Freedom From Unwarranted Governmental Intrusion Concerning Fundamental Issues of Privacy Requires Affirmation of the Court of Appeals' Decision.

This appeal represents a collateral attack on the Court of Appeals' decision in *Onofre*, the underpinning of the opinion below. Recognizing this, petitioner in his application for *certiorari* invited this Court to overrule *Onofre*, which held that New York's consensual sodomy statute violated the right of privacy as well as of equal protection. This Court should decline the invitation. *Onofre* and the decision below both represent sound applications of the right of privacy now recognized under the constitution. While the right of privacy is not absolute, the right to be free from unwarranted intrusion into one's privacy is the very essence of a free society. The concept of individual freedom must include an individual's right to develop his or her own lifestyle as he or she sees fit. Nothing is more fundamental to the concept of privacy than personal sexual conduct, which is what the invalidated New York statutes tried to regulate.

In *Olmstead v. United States*, 277 U.S. 438, 478 (1928), Justice Brandeis, dissenting, articulated a constitutional underpinning for a right of privacy in a passage which has been frequently invoked by this Court:

Also fundamental is the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy.

* * *

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the gov-

ernment, the right to be let alone—the most comprehensive of rights, and the right most valued by civilized men.

This Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1969), recognized the right of privacy as an independent constitutional right. In *Griswold*, the Court, basing its decision upon a "zone of privacy" relationship, struck down a statute which forbade the use of contraceptives by a married couple. The right to privacy was extended to unmarried persons in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), in which this Court concluded that if the distribution of contraceptive devices to persons who were married could not be prohibited, then equal protection must be accorded to unmarried persons:

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marriage couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

405 U.S. at 453; see also *Stanley v. Georgia*, 394 U.S. 557 (1969). In *Roe v. Wade*, 410 U.S. 113, 153 (1973), the Court held that the "right of privacy, . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." In *Bigelow v. Virginia*, 421 U.S. 809, 813 (1975), the Court struck down a statute prohibiting advertising to "encourage or prompt the procuring of an abortion." In *Carey v. Population Services International*, 431 U.S. 678 (1977), the Court struck down a state ban relating to the advertisement of contracep-

tives, concluding that the state may not "suppress the dissemination of concededly truthful information about protected activity." These cases recognize that the right of access to a protected activity "is essential to the exercise of a constitutionally protected right of decision." *Carey, supra*, at 688.

The New York Court of Appeals concluded in *Onofre* that the state had no interest in regulating private consensual sexual behavior between adults and, in particular, "deviate sexual behavior" between homosexuals or unmarried heterosexuals. The Court of Appeals stated:

There is a distinction between public and private morality and the private morality of an individual is not synonymous with nor necessarily will have effect on what is known as public morality. . . . The people have failed to demonstrate how government interference with the practice of personal choice in matters of intimate sexual behavior out of view of the public and with no commercial component will serve to advance the cause of public morality or do anything other than restrict individual conduct and impose a concept of private morality chosen by the state.

51 N.Y.2d at 489-90. New York Penal Law § 240.35-3, because it punishes an individual who engages a willing participant in quiet conversation, offending no other person, at the conclusion of which an invitation is extended to engage in protected conduct, is unconstitutionally violative of the individual's rights of privacy, and the decision of New York's Court of Appeals striking down the statute should therefore be upheld.

The Court of Appeals' decision in *Uplinger*, relying on its decision in *Onofre* for the principle that "the State may not constitutionally prohibit sexual behavior conducted in private between consenting adults," 58 N.Y.2d at 938, concluded that "(t)he object of the loitering statute is to punish conduct anticipatory to the act of consensual sodomy." *Id.* Unless and until this Court prescribes the outer limits of the constitutional rights implicated in these cases, the highest courts of the states

must be free to interpret those rights consistent with this Court's prior decisions which, in this instance, indicate a clear trend of decision developing toward the protection of the activities with which the New York Court of Appeals was concerned in this case.

This Court's summary affirmance in *Doe v. Commonwealth's Attorney*, 403 F.Supp. 1199 (E.D.Va. 1975), *aff'd without opinion*, 425 U.S. 901 (1976)(constitutional challenge in declaratory judgment action to Virginia consensual sodomy law dismissed), did not preclude the New York Court of Appeals from recognizing the right of privacy in this context. As a federal district court recently observed, "six Justices in *Carey [v. Population Services]*, 431 U.S. 678 (1977) agreed that the summary affirmance in *Commonwealth's Attorney* did not definitively answer the difficult question of whether the right of privacy extends to private sexual conduct between consenting adults." *Baker v. Wade*, 553 F.Supp. 1121, 1138 (N.D.Tex. 1982); *accord*, *Onofre*, *supra*, 51 N.Y.2d at 493-94. Furthermore, equal protection arguments pertinent in *Onofre* and *Uplinger* were apparently not raised as a separate ground of constitutional challenge in the Virginia case, where the challenged sodomy law did not distinguish between married and unmarried heterosexuals in forbidding certain sexual conduct. *Baker v. Wade*, *supra*, 553 F.Supp. at 1138 n.44. Thus, the New York Court of Appeals could view its decision in *Uplinger* (flowing from its decision in *Onofre*) as within the developing concept of privacy the outer boundary of which has not yet been marked by this Court.

New York Penal Law § 240.35-3 is no less intrusive than the provisions declared unconstitutional in *Onofre*. It not only punishes an individual who engages a willing participant in a quiet conversation, offending no other person; it also invites inquiry into what type of sex a person has in mind when he stands on a street corner, in a bar, or some other "public place." In sum, it is more than irony that this case will be argued in 1984—it is a reminder, heeded by New York State's highest court, that privacy is the cornerstone of a free society. Both *Onofre* and the decision below are sound.

CONCLUSION

For the reasons stated above, the Committees on Sex and Law, Civil Rights, Criminal Law, and Criminal Courts of the Association urge this Court to affirm the decision of the New York Court of Appeals that Penal Law § 240.35-3 is unconstitutional.

Respectfully submitted,

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MOTION FILED

DEC 17 1983

No. 82-1724

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

STATE OF NEW YORK,

Petitioner,

v.

ROBERT UPLINGER, SUSAN BUTLER,

Respondents.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF NEW YORK

MOTION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF AND BRIEF OF LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC. ON BEHALF OF
RESPONDENT UPLINGER

December 17, 1983

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No. 82-1724

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

State of New York,
Petitioner,

v.

Robert Uplinger, Susan Butler,
Respondents.

On Writ of Certiorari to the New York
Court of Appeals

Motion of Lambda Legal Defense &
Education Fund, Inc. for Leave to
File Brief as Amicus Curiae on
Behalf of Respondent Uplinger

Pursuant to Rule 36.3 of the
Rules of the Supreme Court of the United
States, Lambda Legal Defense & Education
Fund, Inc. respectfully moves for leave
to file the attached amicus curiae brief
on behalf of the Respondent Uplinger in

the above-captioned case. The Respondents, but not the Petitioner, have consented to the filing of this brief.

Lambda Legal Defense & Education Fund, Inc. (hereinafter referred to as "LLDEF") is a New York not-for-profit corporation, authorized to practice law in the State of New York. It is the oldest and largest national gay and lesbian public interest law firm, having been organized in 1973 "to seek, through the legal process, to insure equal protection of the laws and the protection of civil rights of homosexuals" and in furtherance of that purpose, "to initiate or join in judicial and administrative proceedings whenever legal rights and interests of significant numbers of homosexuals may be affected." LLDEF Certificate of Incorporation § 2.2(a). LLDEF is recognized as a

tax-exempt organization by the United States Internal Revenue Service.

Over the past ten years, LLDEF has participated as an amicus in several major constitutional challenges to statutes which restrict or prohibit the private, consensual sexual conduct of homosexuals. LLDEF has recently submitted amicus briefs to United States Courts of Appeal for both the Fifth and Eleventh Circuits in cases which involve constitutional challenges to state sodomy laws: Baker v. Wade, 553 F. Supp. 1121 (N.D.Tex. 1982), (appeal filed, October 28, 1982, 5th Cir. No. 82-1590); Hardwick et al. v. Bowers et al., (11th Cir., No. 83-8378, Filed May 19, 1983) (N.D.Ga., Civil Action No. C83-273A, dismissed April 18, 1983). LLDEF filed an amicus brief on behalf of the Respondent Uplinger before the New

York Court of Appeals, and also submitted an amicus brief to that Court in the case of People v. Onofre, 51 N.Y.2d 476 (1980), cert. denied, 451 U.S. 987 (1981), wherein the New York sodomy statute was declared unconstitutional.

LLDEF has a special interest in participating in challenges to statutes which prohibit or restrict consensual, adult sexual activity because such laws have an especially adverse impact on homosexuals. Evidence indicates that such laws have a substantial deleterious effect on the lives and mental health of gay men and lesbians. National Institute of Mental Health, Final Report of the Task Force on Homosexuality 6 (1972). The statute challenged herein, Penal Law § 240.35(3), clearly affects homosexuals more than any other group because it

prohibits solicitation in public places of so-called "deviate sexual intercourse or other sexual behavior of a deviate nature." As "deviate sexual intercourse" is defined in Penal Law § 130.00(2), the statute effectively prohibits all homosexual requests in public places for sexual intimacy, while still allowing requests for the form of sexual intimacy that is primary for heterosexuals. In addition, as the trial court noted, until the Onofre decision, when Buffalo police began using the statute against prostitutes, the law was enforced in Buffalo almost exclusively against homosexuals. People v. Uplinger, 444 N.Y.S.2d 373, 374 (City Ct. 1981).

Participation in challenges to laws such as this one constitutes the very reason for the existence of LLDEF.

As an organization dedicated to challenging laws such as Penal Law § 240.35(3) which have an adverse impact on homosexuals, LLDEF has developed an understanding of how these laws affect gay men and lesbians in the exercise of their fundamental rights. LLDEF is thus in the best position to assert the broad interest of the group that is most severely affected by this statute. Since the instant action involves a facial challenge to the constitutionality of this statute, it is important that the group interests of gay men and lesbians be adequately considered in addition to the specific interests of the parties. LLDEF is most capable of providing this special assistance.

The LLDEF brief attached hereto addresses the anti-homosexual animus underlying the purpose and

enforcement of Penal Law § 240.35(3) and how the constitutional right of privacy encompasses the Respondent Uplinger's expression of sexuality, both of which issues are not discussed in the brief of that Respondent. In addition, the LLDEF brief expands on the equal protection argument raised by counsel for the Respondent Uplinger in arguing that there is no rational basis for the statutory distinction between solicitations for "deviate" and "non-deviate" sexual conduct.

In order to supplement the arguments of counsel for the Respondents and to present the perspective of the group of individuals most severely affected by the challenged statute, Lambda Legal Defense & Education Fund, Inc. respectfully moves for leave to

file the attached brief as an amicus
curiae on behalf of the Respondent
Uplinger.

Respectfully submitted,

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November 17, 1983

No. 82-1724

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER, SUSAN BUTLER

Respondents.

On Writ of Certiorari to the
Court of Appeals of New York

BRIEF AMICUS CURIAE OF
LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC.
ON BEHALF OF RESPONDENT UPLINGER

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INTEREST OF AMICUS CURIAE

Lambda Legal Defense & Education Fund, Inc., (hereinafter referred to as "LLDEF") is a New York not-for-profit corporation, authorized to practice law in the State of New York. LLDEF is the oldest and largest national gay public interest law firm, having been formed in 1973 "to seek, through the legal process, to insure equal protection of the laws and the protection of civil rights of homosexuals" and in furtherance of that purpose, "to initiate or join in judicial and administrative proceedings whenever legal rights and interests of significant numbers of homosexuals may be affected." LLDEF Certificate of Incorporation

¶ 2.2(a). The legitimacy of these goals as the basis for a not-for-profit corporation was recognized by the New

York Court of Appeals in In Re Thom, 33 N.Y.2d 609 (1973). LLDEF is recognized as a tax-exempt organization by the United States Internal Revenue Service.

LLDEF has a special interest in participating in such cases as the instant one in which discreet conduct by gay men or lesbians is made subject to the penalty of criminal law. Millions of adults in the United States have engaged in sexual contact with persons of the same gender. Bell and Weinberg, Homosexualities: A Study of Diversity Among Men and Women (1978); Kinsey et al., Sexual Behavior in the Human Male 638-641 (Philadelphia 1948); Kinsey et al., Sexual Behavior in the Human Female (Philadelphia 1953); Baker v. Wade, 553 F. Supp. 1121, 1129 (N.D. Tex. 1982) (appeal filed, Oct. 28, 1982, 5th Cir. No. 82-1590) (approximating the gay and

lesbian population of Texas to include 700,000 persons). These Americans have been subjected to irrational hatred and fear, known as homophobia, solely because of their sexual preference.

The arguments presented herein focus on the reasons why prosecutions directed explicitly against homosexuals under Penal Law § 240.35(3) are unconstitutional.

SUMMARY OF ARGUMENT

The record in this case demonstrates a history of invidious discrimination against homosexuals in the enactment and enforcement of Penal Law § 240.35(3). The state legislature deliberately selected only those sexual acts which it defined as "deviate" to be the basis for prosecution for solicitation. Police officers testified at trial that enforcement of the statute

has been targeted almost exclusively against gay men. Such discrimination has profoundly damaging effects on gay men and lesbians, and forecloses a means of sexual expressiveness which is allowed and encouraged for heterosexuals.

Respondent Uplinger's expression of sexuality is constitutionally protected. The right to privacy encompasses sexual orientation and the choice of sexual partners. For gay men and lesbians, the connection between the personal autonomy guaranteed by the privacy right and the expression of sexuality is particularly important. The decision to "come out" publicly as a homosexual is a statement of great personal and political significance.

The self-identifying, public aspect of the choice to be homosexual or

heterosexual includes the initiation of sexual contact, in the quiet and unobtrusive manner of Respondent Uplinger. Penal Law § 240.35(3) creates an impermissible burden on privacy rights by prohibiting homosexuals from discreetly seeking willing sexual partners. Absent a compelling state interest, such a significant burden cannot be imposed on the fundamental rights of privacy and speech. None of the statutory justifications asserted by the Petitioner meets the compelling interest standard.

The challenged statute distinguishes between lawful and unlawful conduct based on the content of communication involved. It prohibits solicitations for "deviate" sexual acts but permits solicitations for "non-deviate" acts. The First Amendment and the Equal Protection Clause of the Fourteenth

Amendment require that content-based restriction on expression be strictly scrutinized. Petitioner attempts to justify this classification by claiming that solicitations for "deviate" sex are somehow more "offensive" than those made for "non-deviate" sex. Petitioner presumes that prejudice against gay male intercourse and against all oral-genital contact is so widespread that the law can freely discriminate. Such a circular rationale does not meet the exacting standards of strict scrutiny.

I. ANTI-HOMOSEXUAL ANIMUS UNDERLIES THE PURPOSE AND ENFORCEMENT OF PENAL LAW § 240.35(3).

Prejudice against homosexuals permeates the record of this case. The history of Penal Law § 240.35(3) reveals that the state legislature amended the original version of the bill, which would have prohibited solicitations for

any kind of sexual activity, by narrowing the scope of the law to penalize only "deviate" acts. Pet. Brief at 27. In upholding Robert Uplinger's conviction, the County Court described his conduct as "a contemptuous disregard for community standards. . ." People v. Uplinger, 449 N.Y.S.2d 916, 920 (County Court, 1982).

Police officers testified at trial in this case that the enforcement of Penal Law § 240.35(3) is targeted against gay men (Joint Appendix at 61, 107) and admitted that its recent use in heterosexual prostitution cases was an effort to "get around" the decision by New York's highest court invalidating the consensual sodomy law. (J.A. 107). Until recent years, Buffalo police used the law as a basis for sending undercover officers into gay bars and arresting

the gay men who approached them there.

(J.A. 75-76).

A hotel owner who testified for the prosecution, apparently to establish that gay men who frequented the vicinity of his hotel were a nuisance, said that he had "received no specific complaints," (J.A. 41); that the men "generally just stand there," (J.A. 42); that he had witnessed only one interaction between a man on the street and a passerby, (J.A. 42); that the men were "reasonably quiet," (J.A. 44); and that he had never seen any of them engage in violence or in imposing themselves on passers-by. (J.A. 46). What made them undesirable, he admitted, was that they were male and homosexual. (J.A. 46).

The harmful effects of such discrimination against gay men and

lesbians are profound. As the chief of the vice investigation bureau of the Buffalo Police Department acknowledged, "these cases can be very, very damaging to an individual's reputation in the community." (J.A. 26). More significant, the foreclosure of the means of sexual expressiveness which is allowed and often encouraged for heterosexuals carries with it the inescapable message to gay men and lesbians that they as persons are "deviate," "abnormal," and thus less worthy human beings. See Baker v. Wade, 553 F. Supp. at 1127-1128; G. Weinberg, Society and the Healthy Homosexual (1972); H.L.A. Hart, Law, Liberty and Morality, 22 (1965) (laws against consensual sexual relations between homosexuals inflict "a special form of punishment on those

whose desires are frustrated by fear of punishment").

II. RESPONDENT UPLINGER'S EXPRESSION OF SEXUALITY IS PROTECTED WITHIN THE SCOPE OF THE FUNDAMENTAL CONSTITUTIONAL RIGHT OF PRIVACY.

The loitering statute at issue here has as its object "to punish conduct anticipatory to the act of consensual sodomy." People v. Uplinger, 58 N.Y.2d 936, 938 (1983). The underlying conduct in the Uplinger case, sexual activity between males, is constitutionally protected. People v. Onofre, 51 N.Y.2d 476 (1980), cert. denied 451 U.S. 987 (1980). A conversation which precedes this lawful conduct is both a critical component of homosexual self-identification and an expression of desire for intimate human contact.

Robert Uplinger's conviction was not based on any sexual act

prohibited in New York State.¹ The discussion between Uplinger and the undercover police agent "was just a brief conversation more or less to the extent of hello, how are you, that type of thing." (J.A. 104). It continued "back and forth" for ten to fifteen minutes before a sexual act was mentioned (J.A. 104, 127), and reflected nothing more than Uplinger's attempt to find a mutually interested sexual partner. There was no evidence of the sale of sexual acts; nor of forcible sex or an age discrepancy between the

1. Petitioner argues that the element of commercial sex is present in the case of Respondent Butler, although she was not arrested or convicted based on that charge. The statute at issue here is not directed at prostitution. The validity of the solicitation for prostitution statute, Penal Law § 230.00, is not under challenge in this case and is not before this Court.

partners indicative of an inherent power imbalance; nor of sex acts committed in public; nor even of a verbal imposition on an uninterested citizen.

Sexual orientation and the choice of sexual partners, like other intimate personal decisions, is safeguarded as part of the right of personal privacy. People v. Onofre, supra.² See L. Tribe, American Constitutional Law, at 941-948 (1978). The right of each

2. The holding in Onofre was premised on the protection of the Equal Protection Clause as well as the privacy right. 51 N.Y.2d at 492. The correctness of the Onofre decision is not before the Court. If this Court should conclude that it wishes to address those major underlying constitutional questions, Amicus respectfully suggests that certiorari in the instant case be dismissed as improvidently granted to allow the issues to be more fully and carefully developed with greater clarity and precision in a future case. Rescue Army v. Municipal Court, 331 U.S. 519, 576 (1947). To adjudicate this case, the Court need only respect the fact that Onofre was, at the time Uplinger was prosecuted, the prevailing and applicable law of New York.

individual to exercise "independence in making certain kinds of important decisions," Whalen v. Roe, 429 U.S. 589, 599-600 (1977), has been developed almost entirely in the context of situations inextricably linked to sexuality, Griswold v. Connecticut, 381 U.S. 479 (1965); often outside marriage, Eisenstadt v. Baird, 405 U.S. 438 (1972); and invariably involving life choices which implicate one's most deeply held moral and ethical beliefs. Roe v. Wade, 410 U.S. 113 (1973). The choice to engage in homosexual activity is not unlike the decision whether to procreate. As this Court explained in Carey v. Population Services International, 431 U.S. 678, 685 (1977), "[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected

choices. . . in a field that by definition concerns the most intimate of human activities and relationships"

"The most intimate of human activities and relationships" is, of course, sexuality.

It is not marriage vows which make intimate and highly personal the sexual behavior of human beings. It is, instead, the nature of sexuality itself or something intensely private to the individual that calls forth constitutional protection.

Lovisi v. Slayton, 363 F. Supp. 620, 625 (E.D.Va. 1973), aff'd on other grounds 539 F.2d 349 (4th Cir. 1976), cert. denied 429 U.S. 977 (1976).

The expression of sexuality cannot be separated from the choice of sexual orientation. See Tribe, American Constitutional Law at 887-888. For gay men and lesbians, the connection between the personal autonomy guaranteed by the privacy right and the expression of

sexuality is particularly acute. "The decision to 'come out of the closet' and avow one's homosexual association is certainly a statement of great personal importance and may also be a political act." K. Karst, The Freedom of Intimate Association, 89 Yale L. J. 624, 654 (1980). See, Gay Law Students' Association v. Pacific Telephone & Telegraph Co., 24 Cal.3d 458, 595 P.2d 592, 156 Cal.Rptr.14 (1979). Cf., Note, on Privacy: Constitutional Protection for Personal Liberty, 48 N.Y.U.L. Rev. 670, 719-738 (1973). Yet it is often when homosexuals seek to assert their choice of sexuality in the most traditional ways that the opprobrium of the majority community is most intense. The courts have by necessity interceded on such occasions to protect the rights of the homosexual minority. In Gay Students

Organization v. Bonner, 509 F.2d 652 (1st Cir. 1974), university administrators unsuccessfully sought to justify a prohibition against gay social functions on campus in part by describing an earlier gay dance as a "spectacle". Id. at 661. Cf., Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980), in which a male high school student was granted an injunction to allow him to attend the senior class dance with a male date.

The self-identifying, public component of the choice to be homosexual or heterosexual includes the initiation of sexual contact. Penal Law § 240.35(3) creates an impermissible burden on the privacy right in prohibiting that option for homosexuals.³ In

3. The burden is magnified because, given the
(Footnote Continued)

Carey v. Population Services Interna-
tional, supra, this Court struck down
statutes limiting access to and adver-
tising of contraceptive and abortion
services. The Court reasoned that these
restrictions burdened the right of
privacy, which incorporates the right to
use contraceptives and obtain abortions.
A significant burden, especially one

(Footnote Continued)

nature of anti-gay discrimination, homosexuals
have been forced to rely on public places to
meet each other. Other social settings, such as
a work place, school or church, are largely
unavailable to gay men and lesbians because of
the enormous risk of openly acknowledging a
minority sexual preference and the absence of
legal protection from any ensuing discrimina-
tion. J. Bell, Public Manifestations of Per-
sonal Morality: Limitations on the Use of
Solicitation Statutes to Control Homosexual
Cruising, 5 J. of Homosexuality 97, 101 (1979).
It has been found that the overwhelming majority
of relationships which are verbally initiated in
public places are expressed sexually in the
privacy of one partner's home. Bell and Wein-
berg, Homosexualities, supra at 77, 305. Such
was the intention of Robert Uplinger in this
case.

which curtails constitutionally-protected speech, cannot be imposed on a fundamental privacy right absent a compelling interest.

Appellants contend that advertisements of contraceptive products would be offensive and embarrassing to those exposed to them, and that permitting them would legitimize sexual activity of young people. But these are classically not justifications validating the suppression of expression protected by the First Amendment. At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify suppression. See e.g., Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).

Carey v. Population Services International, 431 U.S. at 701. Cf. Bolger v. Youngs Drugs Products, ____ U.S. ____, 51 U.S.L.W. 4961 (1983); Bigelow v. Virginia, 421 U.S. 809 (1975). The right to explore common sexual interests in conversation, to inquire quietly if a person is interested in sexual contact,

to be suggestive or responsive as the interaction continues and mutual interest becomes apparent -- these rights are no less protected than the right to advertise contraceptive products or abortion services.

Petitioner seeks to reverse the Court of Appeals' decision on the ground that "all such behavior, as long as it occurs in public, is a legitimate target of the statute." Pet. Brief at 24.⁴ To justify the candid attempt at proscribing non-obscene speech in a public forum, petitioner repeatedly invokes its interest in preventing

4. Penal Law § 240.35(3) is not limited, however, to the "streets", as the State expediently contends. Pet. Brief at 21. Until at least 1976 or 1977, the police used the same law to enter gay bars and arrest men inside for solicitation. (J.A. 75-76). Nothing in the language of the statute would prevent the State from reviving this practice.

harassment of citizens, solicitation of children, unavoidable affronts to passersby, and the degeneration of neighborhoods. Pet. Brief at 8, 9, 14, 15, 17, 18, 19, 20 and 29. Not one of these circumstances, however, was present in the facts adduced below as to Robert Uplinger's conduct. (J.A. 76-77, 103-105.) The acts for which Uplinger was convicted could have as easily occurred in his living room. Moreover, according to the testimony of a vice squad officer with 15 years experience, the inoffensiveness with which Uplinger approached the other man was typical of interactions between gay men on the street. (J.A. 65, 73.)

There is nothing inherently obtrusive about conversations that occur in public places. Private, discreet conversations frequently occur on public

streets, sidewalks, and in parks. A request for sexual intimacy during such a conversation is by no means necessarily annoying or indiscriminate. A study of nearly 1,000 homosexual men in San Francisco by the Kinsey Institute for Sex Research found that "public cruising [looking for a sexual partner] required much more discretion [than cruising in bars and baths], and a system of subtle cues helped cruisers identify each other." Bell and Weinberg, Homosexualities: A Study of Diversity Among Men and Women at 241 (1978).⁵ A similar

5. Far from the threatening, offensive scene described in Petitioner's Brief, the Kinsey report described a typical solicitation in a public place as follows:

The cruising sequence usually began with a person positioning himself on a street or public area. When he spotted a potential sexual partner, the cruiser moved within
(Footnote Continued)

study found that "[s]olicitations are usually made by gesture and quiet conversation," and, as in the instant case, they are too discreet to be overheard by others. Project Report, The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles

(Footnote Continued)

range by driving, walking, or lingering near the person he was cruising. Sometimes this involved looking into the same store window or up at the same marquee or standing together at the same newsstand. Next he made some kind of contact (or waited for the prospective partner to do so). This might involve a smile, a stare, or a lingering eye contact, or it might be verbal: "Do you happen to have the time?" "That's a nice shirt in the window," or more personally, "That's a nice shirt you have on." If the other responded agreeably, the cruiser then suggested getting together in private: "Do you want to come to my place?" "Let's make love," or even, "What do you say we get some coffee?" Soon thereafter, the two would come to an agreement about what to do and where and would stroll (or drive) off together.

Bell and Weinberg, Homosexualities, at 242-43.

County, 13 U.C.L.A. L. Rev. 643, 695 (1966). The openness of such statements or requests has been found to vary "inversely with the publicness of the setting," and generally the communication is so subtle that only others who are mutually interested will understand. E. Delf, The Silent Community, 36, 19-28 (1978); Bell and Weinberg, supra at 230.

The involvement of the police in the investigation of private, consensual, noncommercial and non-violent adult sexual activity implicates as well this Court's expressed concern for establishing ethical and appropriate limits on governmental intrusiveness in personal sexual choices. See, e.g., Stanley v. Georgia, 394 U.S. 557 (1969); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479, 483 (1955). Police activity such as

that described in the record of this case (J.A. 25, 27-28, 63-66, 71-73, 75-76, 99) wastes the credibility and dignity of law enforcement personnel on matters of minimal if not prurient interest to the government. Kadish, The Crisis of Overcriminalization, 374 Annals 160-162 (Amer. Academy of Political and Social Science 1967); Project Report, supra. The fact that the subjects of the investigation at issue are primarily gay men does not minimize the corruption of the purposes of criminal law enforcement.

To fulfill a legitimate interest in maintaining public order, the government must rely on a more precise and narrowly-tailored statute. Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971); Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029, 1042

(5th Cir. 1980), rev'd on other grounds
____ U.S. ____ (1982). Two such laws,
prohibiting disorderly conduct and
harassment, already exist. Penal Law
§§ 240.20 and 240.25. By contrast, the
statute at issue here is "devoid of a
requirement that the conduct prescribed
be in any way offensive or annoying to
others." People v. Uplinger, 58 N.Y.2d
at 938. The government cannot arbitrar-
ily banish sexual expression from public
spaces simply because the speaker seeks
an affirmative response to a minority
sexual orientation.

III. THE DISTINCTION IN PENAL LAW
§ 240.35(3) BETWEEN SOLICITING
FOR SO-CALLED "DEVIATE" AS
OPPOSED TO "NON-DEVIATE"
SEXUAL CONDUCT VIOLATES THE
EQUAL PROTECTION CLAUSE OF THE
FOURTEENTH AMENDMENT.

The challenged statute crim-
inalizes speech by prohibiting

solicitations for "deviate" sexual acts but permitting solicitations for "non-deviate" acts. On its face, the statute differentiates between lawful and unlawful conduct based on the content of the communication involved.⁶ The

6. Penal Law § 240.35(3) also violates the equal protection guarantee of the Fourteenth Amendment by discriminating on the basis of marital status. The statute defines the proscribed sexual acts as criminal only if the two people involved are not married to each other. Penal Law § 130.00(2). In People v. Onofre, supra, this distinction as applied to consensual sodomy was declared unconstitutional as a denial of equal protection. Cf. Eisenstadt v. Baird, 405 U.S. 438 (1972), in which no rational basis was found to restrict access to contraceptives based on marital status. As in Onofre, there is no rational basis for the marital status classification in § 240.35(3).

None of the justifications offered by the Petitioner in support of the statute constitutes a rational basis for this distinction. Whatever affront may be caused to members of the public by overhearing sexual solicitations is the same regardless of whether the individuals speaking are married. Additionally, Petitioner's argument that the inherent nature of a marital

(Footnote Continued)

permissibility of the activity is thus conditioned solely on the nature of the message. A statute which imposes content-based restrictions on expression must be strictly scrutinized. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 102 (1972); see also, Widmar v. Vincent, 454 U.S. 263, 276 (1981). "The Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." Carey v. Brown, 447 U.S. 455, 461-62 (1980).

(Footnote Continued)
relationship precludes public solicitation for sexual activity is unsupported. Pet. Brief at 29. A marital status distinction is arbitrary, unreasonable and inconsistent with the guarantee of equal protection.

The County Court in the instant case incorrectly ruled that only a rational basis for the statute was constitutionally required, and found such a basis in unspecified "historical and presently existing views shared by many in our society concerning deviate and non-deviate sexual conduct. . ."

People v. Uplinger, 449 N.Y.S.2d 916, 921 (County Court, 1982). The court speculated that the legislature may have found solicitation for "deviate" sexual conduct to be "more offensive to the standards of public morality" than solicitation for "non-deviate" sexual conduct. Id. at 921. Petitioner now asks this Court to ratify that justification for the statute, arguing that "such solicitations [are] palpably more obtrusive" and "presumptively more offensive" (Pet. Brief at 27, 28) than

"normal" heterosexual solicitations.

This argument, however, is circular. It depends for its support entirely upon an assumed repulsiveness toward gay men and lesbians and toward all oral-genital sexual contact.

Real life instructs that, to the contrary, much of the conduct defined as "deviate" by New York Law is increasingly common and accepted. Oral sex between heterosexuals is practiced by a large proportion, perhaps a majority, of sexually-active adults. P. Blumstein and P. Schwartz, American Couples (1983). Verbal solicitations in public places of such conduct occur in restaurants, on beaches, in parks, on public conveyances -- a variety of locations where unwitting bystanders may overhear a proposition. Such conversations are depicted in popular films and

periodicals. The very words spoken by Uplinger are also uttered in heterosexual relationships. The extreme "offensiveness" on which Petitioner relies as a rationale for this statute is the presumed reaction when the identical sexual suggestion is made between men. Mere prejudice, however, cannot satisfy even a rational basis test, much less the strict scrutiny which is required in the instant case.

A true concern for curtailing uninvited and unwanted solicitations for sexual intimacy would not distinguish between the "deviate" and "non-deviate" categories created by § 240.35(3). Women accosted by heterosexual males with explicit proposals for "normal" intercourse may also be distressed or repelled. Petitioner relies on a "no

harm in asking" rationale for women,⁷ contrasted with the criminal liability imposed in § 240.35(3) to insure that no male should ever be approached sexually. This reliance embodies a stereotype in the law that all women are appropriately subject to sexual propositions, while men must be shielded from any suggestion of receptiveness to another male's advance. Such gender-based stereotypes cannot be enforced by the state.

Mississippi University for Women v.

Hogan, 102 S.Ct. 3331 (1982); Orr v.

Orr, 440 U.S. 268 (1979); Stanton v.

Stanton, 421 U.S. 7 (1975). It is no

more difficult for a male than a female

7. "...[T]he mere solicitation of illicit intercourse from a woman is quite uniformly held not to amount to an assault. (citations omitted)" Prosser, Law of Torts 40 at n.20 (4th ed. 1971).

to speak the word "no." Nor is it any more offensive for males to be given the responsibility for refusing another's advance. When New York City Police stopped using decoys in 1966 to enforce the homosexual solicitation law, "arrests . . . dropped from more than a hundred a week to almost none, but no outraged crowds appeared in precinct headquarters complaining about homosexual propositions." A. Karlen, Sexuality and Homosexuality, 610 (1971). Accord, Project Report, supra at 698 n.83.

The state does have a compelling interest in insuring that all sexual relations are mutually consented to,⁸ non-violent⁹ and untainted by a

8. See, e.g., New York Penal Law § 130.05 (lack of consent is element of sex offenses).

(Footnote Continued)

coercive imbalance of power between the parties.¹⁰ The most civilized and least obtrusive means of ascertaining whether another human consents or refuses is the spoken word. In the case at hand, Uplinger relied on another person's ability to simply say yes or no to his invitation. Their conversation violated none of the legitimate state concerns for preventing verbal or physical harassment of a sexual nature.

(Footnote Continued)

9. An exhaustive examination of the individual and collective social harm generated by sexual violence can be found in S. Brownmiller, Against Our Will: Men, Women and Rape (1975).

10. See, e.g., Michael M. v. Superior Court, 450 U.S. 464 (1981) (upholding statutory rape law as to females of certain ages); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) and Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) (recognizing the right of action where employee is coerced to accept sexual invitation or suffer adverse job consequences, based upon Title VII of the Civil Rights Act of 1964).

The criminalization of solicitations only for "deviate" acts by the state legislature serves no purpose other than the harassment of homosexuals. No greater protection of public safety results. Penal Law § 240.35(3) discriminates without justification against a class of persons defined by their choice of sexual expression, and thus violates the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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December 17, 1983

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of the Rules of the Supreme Court of the United States, the undersigned member of the Bar of the Supreme Court of the United States hereby certifies that three (3) copies of the preceding Motion for Leave to File Amicus Curiae Brief and Brief of Lambda Legal Defense & Education Fund, Inc. on Behalf of Respondent Uplinger were mailed on December 17, 1983, at the U.S. Post Office in New York City, with first-class postage prepaid, to counsel of record for all parties at the addresses listed below, as required by Rule 28.3 of the Rules of the Supreme Court.

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ON FILED
EC 16 1983

No. 82-1724

IN THE

Supreme Court of the United States

October Term, 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER,

Respondent.

ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS.

Motion for Leave to File Brief and Amicus Curiae Brief of the
National Association of Business Councils; the Federation of
Parents and Friends of Lesbians and Gays; Lesbian and Gay

(Cover Continued on Inside Front Cover)

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Question Addressed.

Since the decision of the State Court below was based upon that State Court's construction of a state statute, was certiorari improvidently granted?

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No. 82-1724
IN THE
Supreme Court of the United States

October Term, 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER,

Respondent.

Motion for Leave to File Brief.

The undersigned, as counsel for the organizations and individuals listed above, respectfully move this Court for leave to file the attached brief as *amicus curiae*.

Amici organizations and individuals have all worked in the area of human rights both within and outside the focus of sexual civil liberties.

The *National Association of Business Councils* is organized under the District of Columbia Non-Profit Corporation Act. The purposes of the corporation include promoting the common business interests of its members and the acceptance of gay businesses and gay business councils in the business and professional community at large. Members of NABC include business and professional organizations located in cities throughout the United States. Members of these organizations assert the importance of their right to travel among the various states for business as well as personal purposes without undue restrictions limiting their re-

lationships with their domestic partners or intimates during that travel. They ask the court to recognize the needs of all human beings to intimacy, and the needs of businesses to be able to send their employees, not only on "business trips," but also for extended periods of time, including permanent transfers, to the states which most benefit the particular business. The restrictions in some states against intimate physical activity between non-married couples can have a chilling effect on the willingness of employees to travel or move into those states. The problem is exacerbated in the case of homosexuals, who cannot, by law, be married. Relegation of these people to lives of celibacy is inappropriate and cruel. If the *Onofre* decision is to be reviewed by this Court, it should be in a case which properly raises and addresses all of these important issues.

The *Federation of Parents and Friends of Lesbians and Gays, Inc.* is a non-profit, tax-exempt, all volunteer organization of member groups throughout the United States. The purposes of the Federation and its members groups include supporting the full human rights and civil rights of lesbians and gays, assisting parents in their effort to understand, accept, and support their children with love and pride, and providing education for individuals and the community at large on the nature of homosexuality so that many of the myths and stereotypes which cause fear and discrimination may be dispelled. Like the National Association of Business Councils, the FPFLG is concerned about the right of those with a minority sexual orientation to travel and to live in and among the various states without unnecessary and unduly restrictive state interference. The context for the FPFLG, however, is not protection of business interests but protection of the family. Labelling persons with a minority sexual orientation as criminals in certain states keeps many children from staying near or even visiting the families of

their parents and other relatives. Such laws encourage "ghettoization" in jurisdictions which accept human diversity without criminal sanctions. Far from destroying the family, the decriminalization of the conduct of those with a minority sexual orientation would lead to a fuller maintenance of the integrity of the family unit and promote family unity, which is an appropriate activity of government. These issues should be addressed in a case which raises them. The present case does not.

The *Lesbian and Gay Interfaith Alliance* is a national association of Judeo-Christian religious organizations having a special outreach to the lesbian and gay community. Member groups include organizations with the following denominational affiliations: Methodists, Episcopalians, Lutherans, Seventh Day Adventists, Friends, United Church of Christ, United Fellowship of Metropolitan Community Churches, and World Congress of Gay and Lesbian Jewish Organizations. Members of this organization assert that First Amendment Establishment Clause arguments should be addressed to this Court in a proper case before the Court reviews the constitutionality of laws which have a direct impact on the private sexual activities of unmarried adult couples. They assert that the origin of the "sodomy" laws is ecclesiastical (as suggested in the dissent of Judge Sutin in *State v. Trejo*, 494 P.2d 173 (N.M. App. 1972); *State v. Bateman*, 547 P.2d 6 (Ariz. 1976); and *Doe v. Commonwealth's Attorney*, 403 F.Supp. 1199 (E.D.Va. 1975), *aff'd without opinion*, 425 U.S. 901 (1976)) and that the state has no valid secular interest in criminalization of such conduct. To validate such laws, therefore, is to assist religious sects in promoting their particular concept of morality over others — whether minority or majority — with a different view. While these issues are not squarely before the Court in the present case, a decision on the constitutional

issues raised in *Onofre* without benefit of participation by all those with a real interest throughout the United States, would be a disservice to the integrity of the law in this country and to the fundamental concepts of Freedom of Religion and Separation of Church and State.

National Gay Rights Advocates is a non-profit legal services corporation which advocates equal rights for, and defends against infringements of constitutional and civil rights of, lesbians and gay men throughout the United States. *Lawyers for Human Rights* is an affiliate of the Los Angeles County Bar Association and was organized in 1976 to provide a focal point from which to address human rights issues, including those which have an impact on the gay and lesbian community. It is made up of judges, attorneys, and law students from diverse backgrounds. Both of these organizations are interested in the same issues as specified above, namely, the right to travel interstate, the promotion of the family, and Separation of Church and State. They also feel that the present case does not present constitutional issues, but that the issues suggested by footnote 2 of the Petitioner's Petition should be addressed only in a case in which those issues are clearly set forth.

All of the individuals named as *Amici* have also worked toward human rights and the integrity of the law as it relates to sexuality. They also concur in and adopt the statements of interest of the organizations described above. In addition, they assert that the laws which still criminalize private consenting adult sexual behavior are scientifically, medically, and psychologically unsound and are based upon myths, stereotypes, and fears which can be replaced with accurate information when the proper case is brought before this Court. A decision on the constitutionality of such laws in the present case would be without the benefit of clearly specified and drawn issues and, therefore, without the full

participation of those interested parties with the expertise and knowledge necessary to provide the court with the fullest possible record upon which to base its decision.

Respectfully submitted,

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LAURENCE R. SPERBER,
JAY M. KOHORN,
Center for Education and
Legal Advocacy,
Attorneys for Amici.

* In response to our request to the parties, both Respondents have consented to our submission of the enclosed brief. In a letter dated December 6, 1983, Petitioner denied such consent.

APPENDIX

No. 82-1724
IN THE
Supreme Court of the United States

October Term, 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER,

Respondent.

Brief Amicus Curiae.

Interest of Amici.

The interest of the *Amici* is set forth in the attached motion for leave to file.

Preliminary Statement.

In 1980, the New York Court of Appeals invalidated that State's consensual sodomy law. That law had proscribed "deviate sexual intercourse." *People v. Onofre*, 51 N.Y.2d 476. This Court denied a petition for a writ of certiorari in 1981. 451 U.S. 987.

While the State has statutes which specifically proscribe sexually soliciting minors, creating a public nuisance, using obscene language, and harassing or annoying others, there is no statute specifically addressing solicitation of "deviate sexual intercourse." Rather, the New York Penal Law contains a "general solicitation" statute which makes it a crime to solicit a crime.

Therefore, when consensual sodomy was no longer a crime in the State, neither was soliciting that conduct, unless the solicitation satisfied the elements of one of the other crimes mentioned above.

There remained extant in the New York Penal Law, however, a proscription against loitering — or lingering — in a public place for the purpose of engaging in or soliciting “deviate sexual intercourse.”

When “deviate sexual intercourse” was a crime, so were the more inchoate anticipatory acts. One step removed from the act was inviting someone to engage in the act. Two steps removed was lingering in a public location with the intent to invite someone to engage in the act.

When “deviate sexual intercourse” was no longer a crime, the question remained whether the anticipatory conduct to what was now a lawful act could still be criminalized. Solicitation was not a problem because the general solicitation law did not apply to lawful acts. But the loitering law remained to be construed by the state courts. The arrest of Robert Uplinger on August 7, 1981, shortly after the *Onofre* decision became final, provided that opportunity.

Mr. Uplinger was arrested for inviting an undercover vice-officer home to engage in an oral sex act. The invitation came in the context of a longer conversation between the two. Although the conversation took place in a public location, there was no evidence that anyone other than the two participated in or heard it.

After Mr. Uplinger was convicted, appeals eventually took the case to the New York Court of Appeals which, in a very short memorandum decision, construed the loitering statute as necessarily a companion to the consensual sodomy statute which had been invalidated earlier. It also affirmed and acknowledged that the purpose of the statute was not

to control harassment or offensive accosting but to control activity anticipatory to a crime. The Court of Appeals concluded that the loitering statute had to fall because there was no basis for the State's continuing "to punish conduct anticipatory to the act of consensual sodomy" after consensual sodomy became legal. The New York court held the loitering statute invalid.

Statutory Provisions.

All sections refer to New York Penal Law:

130.38 Consensual sodomy: "A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person."

100.00 Criminal solicitation, third degree: A person is guilty "when, with intent that another person engage in conduct constituting a crime, he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct."

240.35-3 Loitering: A person is guilty "when he: . . . 3. Loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate sexual nature"

240.20 Harassment: A person is guilty "when, with intent to harass, annoy or alarm another person: . . . 2. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or 3. He follows a person in or about a public place or places; or . . . 5. He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose."

240.20 Disorderly conduct: A person is guilty "when, with intent to cause public inconvenience, annoyance or alarm or recklessly creating a risk thereof: 1. He engages

in fighting or in violent, tumultuous or threatening behavior; or 2. He makes unreasonable noise; or 3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or . . . 5. He obstructs vehicular or pedestrian traffic; or 6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or 7. He creates a hazardous or physically offensive condition by an act which serves no legitimate purpose."

Summary of Argument.

Certiorari in this matter was improvidently granted, and the present case and Petitioner's petition for writ of certiorari do not adequately raise federal constitutional questions. Further, a review at this time of the case of *People v. Onofre*, 51 N.Y.2d 476 (1980), *cert. den.*, 451 U.S. 987 (1981), would be inappropriate and a violation of principles this Court has previously held binding.

Finally, the integrity of our federal system of government is reflected in the deference paid by the United States Supreme Court to the decisions of the high courts of the various states whenever possible. That integrity is on trial directly in the present case.

ARGUMENT.

I.

THIS CASE IS NOT A PROPER VEHICLE FOR REVIEW OF *ONOFRE*.

The Rules of the Supreme Court¹ require that a petition for writ of certiorari set forth the questions presented for review. There is no doubt that the "two questions presented" in the petition in *Uplinger* on their face do not involve *Onofre*. Indeed, it is only in a footnote² that review is suggested with respect to *Onofre*. The fact that Petitioner did not include this request in the "questions presented" seems to support the position of amici curiae that *this record* does not raise the question of *Onofre*'s validity.

There is additional language in the Petition in which the Petitioner further ratifies the *Onofre* decision for the purposes of the present review. For example, on page 8 of the Petition, the Petitioner urges that "[t]he present [loitering] statute does not attempt to control private sexual activities." Private sexual activity was a major concern of the *Onofre* decision. Nonprivate sexual activity is regulated or prohibited by statutes other than that which was the subject of *Onofre*.³ Thus, the Petitioner admits that the present case does not hinge on *Onofre* conduct.

On page 10, the petition reads: "If we acknowledge that a right of privacy exists which *necessarily includes the right*

¹Rule 21 of the Rules of the Supreme Court provides that the petition for writ of certiorari shall contain "(a) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition or fairly included therein will be considered by the Court."

²Petition, p. 6, fn. 1.

³The New York statutory scheme in this area is discussed *infra* at pages 8, 11.

of an individual to engage in whatever sexual practices he desires in the confines of his own home, . . .” (Emphasis supplied.) Therefore, petitioner bases his arguments on the premise that the *Onofre* decision was correct.

In short, in the context of the *Uplinger* case, *Onofre* was not properly presented to this Court for review. While the brief in opposition to the petition for certiorari and other *amicus curiae* briefs attempt to bulwark the validity of *Onofre*, this can only be attributed to an excess of caution. Two factors are crucial. First, the failure of the Petitioner adequately to raise the question. And second, the fact that the present case was not a federal constitutional holding, and this Court, therefore, should not exercise jurisdiction in the matter.⁴

It is also extremely significant that the Petitioner, in his present brief submitted to this Court, has abandoned any interest in requesting that this Court review *Onofre* or its constitutional issues.

Because the constitutional and human issues presented in *Onofre* are so substantial and significant to a large portion of the population of this country, because sex is itself so fundamental and important to the human condition, because of the ecclesiastical nature of the sex taboos discussed in *Onofre*, and because of the realities of the commonplace nature of some of the previously proscribed activities, review in the United States Supreme Court should not be through the back door by way of a footnote in a petition.

⁴In addition, while *amici* recognize that a denial of certiorari may not signify approval or disapproval, it should be noted that *Onofre* discussed in detail the constitutional questions of privacy and equal protection and was extensively briefed before the New York Court of Appeals and subsequently before this Court on petition for certiorari; yet certiorari was denied without dissent by this Court in 1981. (451 U.S. 987) There is no reason to reopen *Onofre* at this time.

If the Court desires to review those issues, such review should be in a case in which the issues *are* clearly presented. Only then will all interested parties have adequate notice of the questions before the Court. Only then will they be able to establish their interest and to participate fully. A decision on the *Onofre* issues would have an impact on many fundamental rights affecting many people, including, for example, the right of unmarried couples to travel interstate throughout the United States. The nature of the federal system combined with constitutional principles of personal liberty require that all inhabitants of the country be free to travel throughout the entire breadth of the United States uninhibited by laws which unreasonably burden or restrict this movement. *Shapiro v. Thompson*, 394 U.S. 618; *United States v. Guest*, 383 U.S. 745. This is just one area of many which demands to be briefed and argued adequately before the United States Supreme Court should undertake to review and decide the *Onofre* issues. In the present case, the constitutional issue of *Onofre* are *not* clearly before the Court.

II.

THE HOLDING IN *UPLINGER* WAS BASED UPON A STATUTORY AND NOT A CONSTITUTIONAL CONSTRUCTION.

The statutory history of Penal Law (P.L.) 130.38 (the *Onofre* statute) is informative as to the legislative purpose behind that enactment. The Temporary Commission on Revision of the Penal Law and Criminal Code had recommended dropping all proscriptions against private acts of consensual sodomy. The legislature restored the consensual sodomy offense because deletion thereof might ostensibly be construed as legislative approval of deviate conduct. 51 N.Y.2d at 489.

The heart of the state proscription against the private sexual conduct of unmarried consenting adults was therefore removed when the consensual sodomy law was invalidated

in *Onofre*. The *Uplinger* case simply removed an artery which had received its life from that excised heart.

In other words, in *Uplinger* the Court of Appeals, in a very summary decision, construed P.L. 240.35, subd. 3, as a "companion statute to the consensual sodomy statute (P.L. 130.38)." Such a construction of the law, whether or not erroneous, is clearly not a concern of the Supreme Court. The State has construed its own laws, and, as the cases mandate, this Court considers itself bound by the State's construction, especially when it does no more than to hold that one statute is necessarily a "companion" to another. After the *final* arbiter as to the statutory — not constitutional — construction of the statute has thus construed it, neither the petitioner nor the federal courts may override that statutory construction. Therefore, all of the petitioner's arguments quarreling with the State Court's construction are misplaced and should be presented to the state legislature.⁵

Based upon the fact that the loitering statute was a "companion" to the consensual sodomy statute, and since the former merely punished conduct anticipatory to the latter, the New York Court of Appeals simply refused to sever the two related laws. When the primary law fell, the secondary statute, inextricably intertwined with the other, naturally and logically followed. The non-severability of these companion statutes is reasonable in light of the entire statutory scheme discussed below. In any case, the State's high court has the power to make such a determination without fear of federal review. All of the other constitutional arguments in this case are surplusage.⁶

⁵The New York Court of Appeals suggested as much in *Uplinger*, 58 N.Y.2d at 937.

⁶It is further submitted that the ruling of the New York Court of Appeals was not bottomed on constitutional issues presented in *Onofre* but rather on the *fact* that the sodomy law was previously invalidated; under its construction of the loitering statute (set forth in detail *infra*), the New York court was precluded from doing other than what it did by the doctrine of *stare decisis*.

III.

NOT ONLY IS THE STATUTORY CONSTRUCTION OF THE NEW YORK COURT AUTHORITATIVE, IT IS ALSO REASONABLE.

A. The State Court's Construction Is Authoritative and Non-Reviewable.

As this Court stated in *Gregg Dyeing Co. v. Querry*, 286 U.S. 472, at 480:

"When the Supreme Court of the State has held that two or more statutes must be taken together, we accept that conclusion as if written into the statutes themselves."⁷

This Rule is in line with a long history of cases declaring that the highest court of a state is the final authority in interpreting the meaning and effect of state laws.⁸

Once a state court has interpreted its own statutes, the federal courts, including this Court, "follow its construction, subject to the inquiry whether the statute as construed is consistent with the Constitution of the United States." *Anglo American Provision Co. v. Davis Provision Co.*, 191 U.S. 373, 374 (1903). For purposes of deciding constitutional questions, the Supreme Court must take a state statute as though it read precisely as the high court of that State has interpreted it. *Minnesota v. Probate Court*, 309 U.S. 270.⁹

Likewise, in *O'Brien v. Skinner*, 414 U.S. 524, 531 (1973), in determining the constitutionality of statutes gov-

⁷Citing *Herbert v. La.*, 272 U.S. 312, 317, and *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 73.

⁸See: *Howe Mach. Co. v. Gage*, 100 U.S. 676.

⁹See also: *Landmark Communications v. Virginia*, 435 U.S. 829; *New York v. Ferber*, U.S., 102 S.Ct. 3348.

erning absentee ballots in New York, This Court stated that "it is not our function to construe a state statute contrary to the construction given it by the highest court of a State."

B. The State Court's Construction Is Reasonable.

The New York Court of Appeals made three critical statements regarding judicial construction of the loitering statute prior to declaring the statute unconstitutional.

First, the specific loitering law "must be viewed as a companion statute to the consensual sodomy statute" 58 N.Y.2d at 936.

Second, "[t]he object of the loitering statute is to punish conduct anticipatory to the act of consensual sodomy. * * * [I]t was aimed at proscribing overtures . . . leading to what was . . . an illegal act." 58 N.Y.2d at 937.

These first two statements are consistent with the legislative history of the loitering law. When the statute was first introduced in March of 1964, Assembly Bill A-5376 (later numbered A-6187) proscribed loitering to solicit or engage in any "lewd or sexual act."¹⁰ The statute as it exists now reflects the amendments which resulted in the loitering proscription's application solely to "deviate sexual intercourse", or consensual sodomy.

Third, "the challenged statute may not be characterized as a harassment statute. * * * [I]t was aimed at proscribing overtures, not necessarily bothersome to the recipient," 58 N.Y.2d at 937. When testing a state law's validity, the United States Supreme Court may *not* give the law some significance which the State's highest court has expressly stated it does not have. *Orr v. Allen*, 248 U.S. 35.

The New York court's construction is also consistent with the entire legislative statutory scheme contained in the penal

¹⁰At section 250.15(3) of Assembly Bill A-6187.

law relating to sexual and offensive conduct and speech:

* "Personal Harassment" is proscribed by P.L. 240.25;

* "Soliciting Public Sexual Conduct" is prohibited by P.L. 245.00 coupled with P.L. 100.00;

* "Disorderly Conduct," P.L. 240.20, proscribes use of obscene or abusive language in public;

* "Sexual Solicitation of a Minor" is criminalized in P.L. 100.05;

* "Criminal Nuisance" is prohibited by P.L. section 240.45.

To use the loitering law for any of *these* purposes would be logically contrary to legislative intent in that the elements of the criminal laws specifically designed for these areas could be avoided, including, in some cases, specific intent.¹¹

Under the reasonable construction of the law as contained in *Uplinger*, the loitering statute was a companion statute with the sole purpose of criminalizing and punishing anticipatory conduct or speech designed to lead to a criminal act, that is, loitering connected with overtures leading to the illegal act of consensual sodomy. It was not a nuisance or harassment statute, and to treat it as such would circumvent the legislation specifically provided for nuisance or harassment. All other areas implicated, including prostitution, public sexual activity, and sex with minors, are also the subject of well-focused statutes specific to those areas.

It thus follows logically and, perhaps, necessarily, as a matter of statutory construction, that this loitering statute must fall with the demise of the consensual sodomy law. At least there is no question but that this issue lies within the particular province of the New York Court of Appeals to decide.

¹¹Such as in the harassment and disorderly conduct statutes.

IV.

THIS COURT SHOULD AVOID DECIDING UNNECESSARY CONSTITUTIONAL ISSUES AND SHOULD, THEREFORE, DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED.

If a case can be decided without reaching constitutional issues, it should be so decided; only out of necessity for adjudication of rights of litigants actually before the court are constitutional judgments justified. *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973), including a reference to *Marbury v. Madison*, 1 Cranch 137, 178 (1803). Therefore, certiorari was improvidently granted.

When it becomes apparent that the opinion of a state court may have been based on state law, the appropriate action for this Court is to dismiss the writ.

In *Lynch v. People of New York ex Rel. Pierson*, 293 U.S. 52, the New York Appellate Division annulled a tax determination, citing cases decided under the Fourteenth Amendment to the United States Constitution. The Court of Appeals affirmed that action without giving an opinion. The Supreme Court dismissed the writ of certiorari as having been improvidently granted. While it recognized that it might "be surmised" that the State decision rested on federal grounds, the Court stated that "jurisdiction cannot be founded upon surmise [I]f it does not appear upon which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it, the Court will not take jurisdiction." *Lynch, supra*, at 54-55.

It has long been the policy of this Court to avoid deciding constitutional issues if there are other suitable grounds upon which the case may be decided.

As the Court stated in *Rescue Army v. Municipal Court*, 331 U.S. 549, 568 (1946):

"From *Hayburn's Case*, 2 Dall. 409, to *Alma Motor Co. v. Timken Detroit Axle Co.* [329 U.S. 129] . . . this Court has followed a policy of strict necessity in disposing of constitutional issues. The earliest exemplifications . . . rose in the Court's refusal to render advisory opinions and in applications of the related jurisdictional policy drawn from the case and controversy limitation. . . . The same policy has been reflected continuously not only in decisions but also in Rules of Court and in statutes made applicable to jurisdictional matters, including the necessity for reasonable clarity and definiteness, as well as for timeliness in raising and presenting constitutional questions."

If, in its avoidance of a more lengthy opinion, the court in *Uplinger* created ambiguities or any lack of clarity as to its reasoning, *Rescue Army, supra*, would seem to dictate that the lack of "reasonable clarity and definiteness" as to the "constitutional questions" should result in the conclusion that certiorari was improvidently granted. Certainly, if the *Uplinger* decision were based upon constitutional issues, the opinion does not inform anyone as to whether the decision is based upon privacy, equal protection, due process, or some First Amendment consideration. Neither this Court nor any counsel addressing it has sufficient information upon which to properly argue or decide the correctness of unspoken reasoning for possible unmentioned constitutional bases for the holding.

This policy of deciding constitutional questions only when necessary and only when clearly and adequately presented has not been limited to jurisdictional issues, as the Court also has:

"developed, for its own governance in cases within its jurisdiction, a series of Rules under which it has avoided passing upon a large part of all constitutional questions

pressed upon it for decision." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (concurring opinion of Brandeis, J. joined by Cardozo, Stone and Roberts, JJ.).

This policy requires that if the case before it *may* be decided on statutory grounds, this Court should avoid reaching the constitutional issues presented. As the Court stated in *Giler v. Louisville and Nashville R. Co.*, 213 U.S. 175, 191:

"[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."

In the instant case a review of the opinion of the New York Court of Appeals reveals that the case turned on whether the loitering statute was severable from the consensual sodomy statute. In calling the loitering statute a "companion" statute and, as a result, invalidating it, the Court of Appeals was deciding the severability issue in the negative. The Court thus declined to transform the statute to have a purpose different from that which it had determined the legislature intended. To do otherwise, the Court would have had to engage in judicial legislation. The only real issue before the United States Supreme Court now is the correctness of that statutory determination by the New York Court of Appeals.

In fact, in order to reach the constitutional issues raised in *Onofre* and discussed in the other briefs submitted to the Court, this Court must be willing to give a purely advisory opinion.

Rescue Army v. Municipal Court, 331 U.S. 549 (1946), was similar in its posture to the case presently pending before this Court. In *Rescue Army*, the California court, in an opinion "ambiguously incorporating parts of an opinion in another case," sustained the state code sections involved

"without identifying provisions of the code or passing on questions of local procedure."

In dismissing that case, this Court declined to exercise its jurisdiction to pass on constitutional issues since they were presented in an abstract and speculative form and since the State Court did not clearly interpret numerous ambiguous and interdependent provisions of the intricate chapter out of which they arose. This Court stated that constitutional issues should be considered only when they are presented "in clean-cut and concrete form, unclouded by a serious problems of construction relating to either the terms of the questioned legislation or to its interpretation by the state courts."¹²

V.

CONCLUSION.

Amici Curiae herein argue that the *Uplinger* opinion presents issues of statutory construction rather than constitutional questions. The New York Court of Appeals has not in the past been at a loss for words in the area of constitutional analysis; yet, in *Uplinger*, it reached its decision in three paragraphs without mentioning any specific constitutional rationale. The lack of constitutional analysis is further indication that the invalidation of the loitering statute was not on constitutional grounds but rather because the purpose of the loitering statute in the statutory scheme was

¹²See also: *Belcher v. Stengel*, 429 U.S. 118, 119 (1976) ("... it appears that the question framed in the petition for certiorari is not in fact presented by the record now before us."); *Atchley v. California*, 366 U.S. 207 (1961) ("... we conclude that the totality of circumstances did not warrant bringing the case here."); *Kimbrough v. United States*, 364 U.S. 661 (1961) ("... we have concluded that this question is not presented with sufficient clarity in this case."); and *Needelman v. United States*, 362 U.S. 600 (1960) ("... we conclude that the record does not adequately present the questions tendered in the petition.").

to punish solicitations of consensual sodomy when consensual sodomy had been against the law.

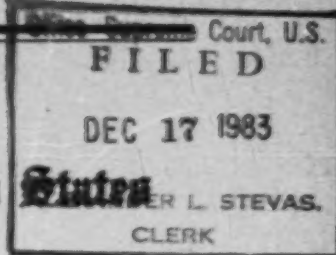
Perhaps, under certain circumstances, public solicitation of non-criminal sexual activity might be the subject of valid proscription, such as when such public speech is aimed at harassing or offending others or where it constitutes some sort of nuisance or public danger. In the case of the New York law, however, other specific criminal statutes cover all of these concerns, and use of the loitering statute in these areas avoids the specific ingredients which the New York legislature chose to require as elements of those crimes.

The New York Court of Appeals, therefore, correctly viewed the loitering statute's purpose solely as criminalizing conduct anticipatory to an illegal act. When the ultimate act was no longer illegal, the speech anticipating it, and lingering in a location with the purpose of uttering such speech anticipating it, could not remain a crime. While the Court was not specific about any constitutional rationale for such a holding, it was very specific about the statutory construction which led the Court to its conclusion. Statutory construction is all we are clearly confronted with in the opinion, and this is a matter which this Court has consistently held to be within the non-reviewable discretion of the State Court.

For all of the foregoing reasons, *Amici Curiae* herein urge this Court to dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States
October Term, 1983

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,
vs.

ROBERT UPLINGER and SUSAN BUTLER,
Respondents.

**BRIEF AMICUS CURIAE OF THE ATTORNEY
GENERAL OF THE STATE OF NEW YORK**

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Question Presented

Whether New York Penal Law § 240.35(3), as applied to respondents, violates the rights of freedom of speech and privacy guaranteed by the United States Constitution.

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No. 82-1724

IN THE
Supreme Court of the United States
October Term, 1983

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,
vs.

ROBERT UPLINGER and SUSAN BUTLER,
Respondents.

**BRIEF AMICUS CURIAE OF THE ATTORNEY
GENERAL OF THE STATE OF NEW YORK**

Interest of the Amicus

The *amicus curiae*, the Attorney General of the State of New York, submits this brief pursuant to Supreme Court Rule 36.4, which permits the Attorney General of a state to submit an *amicus curiae* brief without the consent of the parties. Pursuant to his responsibilities as chief legal officer of the State under New York Executive Law § 63 and his responsibilities to protect the civil rights and liberties of New York's citizens, the Attorney General urges this Court to rule that New York Penal Law § 240.35(3), as

applied here, violates the rights of freedom of speech and privacy afforded by the United States Constitution. The New York Court of Appeals, however, unnecessarily struck down the statute in its entirety. Penal Law § 240.35(3) is constitutional to the extent that it prohibits conduct other than loitering for the purpose of engaging, or soliciting another person to engage, in consensual sodomy.

Statement of Facts

Respondents Robert Uplinger and Susan Butler were charged in separate incidents in the City of Buffalo, New York, with violating a subsection of New York's loitering statute, New York Penal Law § 240.35(3) (McKinney 1980), which prohibits loitering or remaining "in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature."

Uplinger

On August 7, 1981 at 3:15 a.m., in Buffalo, New York, Robert Uplinger was arrested for the offense of loitering for the purpose of soliciting a person to engage in deviate sexual intercourse. (Joint Appendix ["J.A."] 13, 103-05). Uplinger had approached an undercover male police officer and spoke with the officer for approximately ten to fifteen minutes prior to his arrest. (J.A. 104). The officer had been assigned to the area, which was frequented by gay males, for the purpose of arresting suspected homosexuals if he was propositioned. (J.A. 62-65, 105). Several other males approached and spoke with the officer and Uplinger. As the group conversed, two other police officers came by on

patrol and ordered the group to move on. As they walked away, Uplinger invited the undercover police officer to his apartment. (J.A. 104). When asked what he wanted to do there, Uplinger responded "I'll blow you". This statement was deemed an invitation for oral sex and Uplinger was then arrested. (J.A. 104-05). Nothing that the undercover officer did gave any indication that the defendant's eventual sexual advances were unwelcome. There was no mention of money at any point in the conversation. (J.A. 76, 103-05).

Butler

Respondent Susan Butler was arrested on April 1, 1981 in Buffalo at about 12:30 a.m. (J.A. 1). Butler, who had a prior record for prostitution, was observed waving at cars. (J.A. 1-2). A police officer followed a car that Butler entered and observed her committing an act of oral sodomy. (J.A. 2). Both Butler and the driver were charged with loitering to commit a deviate sexual act. (J.A. 2).

Procedural History

The Buffalo City Court denied Uplinger's motion to dismiss the action on the ground that Penal Law § 240.35(3) was unconstitutional, and convicted him of violating the statute. The conviction was appealed to the Erie County Court where it was considered along with *People v. Butler*, 110 Misc.2d 843, 443 N.Y.S.2d 40 (Buffalo City Ct. 1981). In *Butler*, the City Court had granted the defendant's motion to dismiss, holding that Penal Law § 240.35(3) was unconstitutional. The Erie County Court upheld the conviction in *Uplinger* and reinstated the information in *Butler*. *People v. Uplinger*, 113 Misc.2d 876, 449 N.Y.S.2d 916 (Erie Co. Ct. 1982). After leave to appeal was granted, the New

York Court of Appeals reversed the order of the County Court and directed that both informations be dismissed. *People v. Uplinger*, 58 N.Y.2d 936, 460 N.Y.S.2d 514 (1983). On October 3, 1983, this Court granted certiorari. — U.S. —, 104 S. Ct. 64.

Summary of Argument

New York Penal Law § 240.35(3), which prohibits loitering or remaining “in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature,” as applied to respondents, infringes upon the constitutional guarantees of freedom of speech and the right to privacy. The statute, as applied, punishes persons simply for their words and for their decision to engage in consensual sexual activity protected by the right to privacy. No compelling governmental interests exist to justify infringement of these fundamental constitutional rights, and, therefore, the statute may not constitutionally be applied to these respondents.

The New York Court of Appeals, however, erred in striking down the statute *in toto*. Areas of behavior remain which New York State may prosecute criminally under Penal Law § 240.35(3) without violating the constitution. Therefore, the order of the Court of Appeals should be vacated and the cases remanded to the Court of Appeals with a direction that the application of Penal Law § 240.35(3) be prohibited with respect to persons who loiter for the purpose of engaging, or soliciting another person to engage, in consensual “deviate sexual intercourse”, as that term is defined in Penal Law § 130.00(2).

ARGUMENT

POINT I

New York Penal Law § 240.35(3), as applied, violates the right to freedom of speech guaranteed by the First and Fourteenth Amendments to the United States Constitution.

This case presents the issue of whether a state may punish a person solely because in a public place he verbally invites another, in a discreet and inoffensive manner, to partake in a sexual act in private which the highest court of that state has declared to be lawful.* The New York Attorney General respectfully submits that the First Amendment, as applied to the states by the Fourteenth Amendment, prohibits such punishment.

Respondent Robert Uplinger, a homosexual, was arrested because he verbally tried to seduce an undercover police officer in a discreet and inoffensive manner.** The

* In 1980, prior to Uplinger's arrest, the New York State Court of Appeals had struck New York's prohibition of consensual sodomy on the grounds that it violated both the constitutional guarantee of privacy and the equal protection clause of the Fourteenth Amendment. *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981). See Point II, below.

** Respondent Susan Butler, although observed attempting to flag down cars and later observed in the act of consensual sodomy inside a car parked on a public street, was not charged with public lewdness, Penal Law § 245.00, or loitering for the purpose of engaging in prostitution, Penal Law § 240.37. Because Penal Law § 130.38 had been found unconstitutional by the New York Court of Appeals on equal protection and privacy grounds, *People v. Onofre*, and no statute prohibiting public acts of consensual sodomy has been enacted by the New York legislature, the District Attorney evidently believed Ms. Butler could not be prosecuted for the actual act which she was

(footnote continued on next page)

question here is not the morality of Uplinger's intended acts, but whether his words may be constitutionally punished. The Attorney General submits that they may not. There are no facts before this Court which would place Uplinger's words beyond the First Amendment's protections. He did not invite or encourage anyone to break any law in effect in New York State. *Cf. Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969). His behavior did not harass or annoy anyone, or incite anyone to violence. *Cf. Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Uplinger's words, although said in a "public place", were not publicly spoken: there were no witnesses, willing or unwilling, to the conversation between him and the undercover police officer.* Uplinger's words, while perhaps sexually explicit slang, were not sufficiently erotic to meet the threshold test for obscenity. Accordingly, those words are protected by the First Amendment. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975); *Cohen v. California*, 403 U.S. 15 (1971).

observed committing in a car on a public street. Instead, she was prosecuted under Penal Law § 240.35(3) for her gestures, which were taken to be invitations to persons to commit deviate sexual intercourse with her. The propriety of her arrest must be judged not by whether her conduct may ever be constitutionally punished, but by whether she may constitutionally be punished for the crime with which she was charged. In this respect, her case must be judged by the same standards as Uplinger's.

* "Public place" is broadly defined by the New York Penal Law:

"Public place" means a place to which the public or a substantial group of persons has access, and includes but is not limited to, highways, transportation facilities, schools, places of amusement, parks, playgrounds, and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence. Penal Law § 240.00(1).

“[T]he First Amendment has not generally been confined to the protection of high-minded discussion among savants. . . .” L. Tribe, *American Constitutional Law* (1978) at 666. “[S]o long as the means are peaceful, the communication need not meet standards of acceptability.” *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Entertainment, including entertainment of a sexual nature, is protected by the First Amendment. *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981); *Erznoznik v. City of Jacksonville*, 422 U.S. 205; *Stanley v. Georgia*, 394 U.S. 557, 566 (1969). New York State may not constitutionally punish Uplinger for his words alone, when he engaged in no “separately identifiable conduct” which was illegal. *Cohen v. California*, 403 U.S. 15, 18.

Moreover, the First Amendment generally prohibits a state from drawing distinctions based upon the content of its citizens’ speech. In *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972), this Court reiterated this principle when it struck down a local ordinance which permitted labor union picketing and prohibited all other types of picketing. Justice Marshall wrote for the Court, “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” 408 U.S. 92, 95. Because Uplinger’s speech is of a kind protected by the First Amendment, the state may not prohibit it while permitting other kinds of speech at the same time and place and in the same manner.*

* This Court has recognized an exception to the content-neutrality rule in the context of zoning regulations which serve a substantial state interest. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Obviously, this exception does not apply here.

Of course, if the New York legislature or the City of Buffalo so desired, each could place reasonable time, place and manner restrictions on the use of their streets, bearing in mind that streets are akin to public forums. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). Such restrictions, of course, would have to be content-neutral and serve a substantial governmental purpose. *Heffron*, 452 U.S. 640, 648; *Mosley*, 408 U.S. 92, 95-99. In *Heffron*, this Court upheld a Minnesota state fair rule limiting solicitation by any group at the Minnesota state fair to a particular time, place and manner, i.e., from duly licensed booths on the fair grounds. Because the members of the Krishna Society who challenged the rule were treated no differently than members of any other group seeking to solicit at the fair, and because solicitation itself was not barred, the Court found no infringement of their First Amendment rights. In stark contrast to the regulation at issue in *Heffron*, Penal Law § 240.35(3), as applied, prohibits altogether one kind of speech in all public places: speech aimed at obtaining a certain form of sexual gratification even though no operative law bars the sexual conduct itself.*

Finally, although a prohibition on speech may be justified by compelling state interests, no such interests exist here to justify this invasion of First Amendment rights. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208-215; *Stanley v. Georgia*, 394 U.S. 557, 566-68 (1969); *Street v. New York*, 394 U.S. 576, 590-93 (1969).

* Even in *American Mini Theatres, Inc.*, where this Court permitted Detroit to impose on adult theatres zoning regulations, the Court emphasized that Detroit was not prohibiting adult theatres altogether, but simply regulating where they could be established. 427 U.S. 50, 70-71.

Three interests of the State have been suggested to justify the broad reach of Penal Law § 240.35(3). These interests are: (1) protecting "the right of an individual to choose not to hear on public streets solicitations of a lewd and intimate nature," Petitioner's Brief ("Pet. Br.") at 16; (2) protecting minors from deviate sexual activity, and, in particular, preventing them from becoming "involved as solicitors of deviate sex for payment", Pet. Br. at 18-19; and (3) preventing public nuisances, Pet. Br. at 20. None of these asserted interests justify the broad reach of the statute.

The soliciting speech of Uplinger, and that of others whom the statute similarly would catch in its net, is not an audio or visual assault directed at a "captive audience". Cf. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Kovacs v. Cooper*, 336 U.S. 77 (1949). Passersby disturbed by activities of persons such as Uplinger may avert their eyes and ears, or simply say "no" to unwelcome, but unforced, overtures. *Cohen v. California*, 403 U.S. 15, 21; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-12 (1975).^{*} And because the statute reaches entirely private conversations between willing participants—where there is no audience—the prohibition may not be justified by the principle that the government may act to limit speech "upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California*, 403 U.S. 15, 21.

As for the protection of minors, Penal Law § 240.35(3) is not specifically, or narrowly, drafted to address that

^{*} The statute cannot, on "moral sensibility" grounds, be justified as discouraging deviate sexual intercourse between willing participants, because this sexual activity is legal in New York. *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947.

important purpose. It carries along much protected activity in its sweep, see *Erznoznik*, 422 U.S. 205, 212-14. While New York could bar solicitation of minors for sexual activity—consensual or not, this statute does far more. Indeed, other laws exist to guard against this evil. See, e.g., Penal Law §§ 230.04-06, 230.25-32.*

Lastly, a statute cannot survive scrutiny under the First Amendment when its purpose simply is to prevent the annoyance of passersby; “‘[u]ndesirables’ or their ‘annoying’ conduct may not be punished.” *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). See also *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971) (“The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be ‘annoying’ to some people.”).

The City of Buffalo, like the City of Cincinnati in *Coates*, has narrower options available to it to ensure that its streets remain usable by the public at large and are not controlled by any one social group:

The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of anti-social conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. 402 U.S. 611, 614.

* Even if those other laws “do not easily succumb to enforcement due to the problem of proving payment absent solicitation of an undercover police officer,” Pet. Br. at 19, that fact cannot justify the reach of the statute here. A similar argument was rejected by this Court in *Stanley v. Georgia*, 394 U.S. 557, 567-68, which declared that a “restriction [of a fundamental right] may not be justified by the need to ease the administration of otherwise valid criminal laws [citation omitted]”.

New York's legitimate interests in prohibiting harassing and annoying behavior on its streets, and in protecting its youth, may be met by utilizing existing criminal statutes which prohibit, *inter alia*, criminal solicitation, Penal Law §§ 100.00-08; sodomizing minors, Penal Law §§ 130.40-50; patronizing a minor prostitute, Penal Law §§ 230.04-06; promoting the prostitution of minors, Penal Law §§ 230.25-32; unlawful assembly, Penal Law § 240.10; disorderly conduct, Penal Law § 240.20; harassment, Penal Law § 240.25; loitering for the purpose of engaging in a prostitution offense, Penal Law § 240.37; criminal nuisance, Penal Law § 240.45; and public lewdness, Penal Law § 245.00. Also, the state could enact legislation narrowly tailored to its specific interest, *e.g.*, legislation which prohibits solicitation in a public place to engage in sexual behavior where the solicitation is of a harassing nature. *People v. Uplinger*, 58 N.Y.2d 936, 938, 460 N.Y.S.2d 514, 515.

In short, because Penal Law § 240.35(3), as applied, prohibits speech protected by the First Amendment and the State of New York has no compelling interests to justify the statute's incursion into this constitutionally protected area, Penal Law § 240.35(3)'s reach must be limited to loitering activities unprotected by the First Amendment.* The soliciting speech of Uplinger and others like him is precisely the kind of speech—unpopular and representing a minority point of view—that the First Amendment was designed to protect. *See Stanley v. Georgia*, 394 U.S. 557, 565-66.

* The New York Court of Appeals' conclusion that the statute must be struck in its entirety was incorrect. *See* Point III, below.

POINT II

New York Penal Law § 240.35(3), as applied, violates the right to privacy guaranteed by the First, Fourth, Ninth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Penal Law § 240.35(3), at issue here, is inextricably linked to Penal Law § 130.38, which blanketly proscribed consensual sodomy between unmarried persons.* In holding Penal Law § 240.35(3) unconstitutional in the instant case, the New York Court of Appeals relied on its previous decision in *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981), which struck Penal Law § 130.38 as unconstitutional on the ground that it violated both the rights of privacy and equal protection contained in the United States Constitution.

The Court of Appeals' opinion in *Uplinger* held that because consensual sodomy was no longer illegal, it would be improper for the state to punish loitering for the purpose of engaging, or soliciting another to engage, in that conduct. *Uplinger*, 58 N.Y.2d 936, 938, 460 N.Y.S.2d 514, 515. The New York State Attorney General respectfully urges this Court to adopt the sound reasoning of the New York Court of Appeals in support of its holdings that both statutes violate the right to privacy embodied in the penumbras of the First, Fourth, Ninth and Fourteenth Amendments.

* Penal Law § 130.38 provides that "a person is guilty of consensual sodomy when he engages in deviate sexual intercourse. . . ." Deviate sexual intercourse is defined as "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva". Penal Law § 130.00(2).

The right to privacy is, of course, fundamental to our American democracy. As Justice Brandeis eloquently wrote over 50 years ago:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

This Court has not placed any firm boundaries on this most basic right. *Carey v. Population Services International*, 431 U.S. 678, 684-85 (1977). Instead, it has expanded the right of privacy to fit the requirements of a modern society.

The right to privacy encompasses: personal decisions relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and abortion, *Roe v. Wade*, 410 U.S. 113 (1973). The right also guarantees a person the freedom to possess obscene material in the privacy of his home. *Stanley v. Georgia*, 394 U.S. 557. In general terms, the constitutional right of privacy encompasses “the interest in independence in making certain kinds of important decisions,” *Carey v. Population Services International*, 431 U.S. 678, 684, citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977), and “the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy,” *Stanley v. Georgia*, 394 U.S. 557, 564.

Because unmarried persons are protected from unwarranted intrusions into matters "so fundamentally affecting a person as the decision whether to bear or beget a child," *Eisenstadt v. Baird*, 405 U.S. 438, 453, and because persons may obtain gratification from obscene materials in their home, *Stanley v. Georgia*, 394 U.S. 557, 565, there should be no question that, as the New York Court of Appeals held in *People v. Onofre*, the right to privacy extends as well to unmarried persons who engage in consensual sex, including consensual sodomy, in a private place, and that Penal Law § 130.38 violates that right of privacy:

[T]he People have failed to demonstrate how government interference with the practice of personal choice in matters of intimate sexual behavior out of view of the public and with no commercial component will serve to advance the cause of public morality or do anything other than restrict individual conduct and impose a concept of private morality chosen by the State. 51 N.Y.2d 476, 490, 434 N.Y.S.2d 947, 952.

Moreover, as the Court of Appeals held, Penal Law § 130.38 also violates the equal protection clause, as it bars unmarried persons, but not married persons, from engaging in certain sexual acts. See *Eisenstadt v. Baird*, 405 U.S. 438, 447.*

* The New York Court of Appeals was cognizant of the argument that consensual sodomy is immoral and, as such, should be prohibited by the legislature. The Court recognized, however, that morality in personal decision-making, when the outcome creates no harm to anyone, may not be legislated:

We are not unmindful of the sensibilities of many persons who are deeply persuaded that consensual sodomy is evil and should be prohibited. That is not the issue before us. The issue before us is whether, assuming that at least at present it is the will of the community (as expressed in legislative enactment) to pro-

(footnote continued on next page)

Further, New York State may not constitutionally bar persons from loitering or remaining "in a public place for the purpose of engaging, or soliciting another person to engage, in" consensual sodomy—conduct protected by the Constitution. Even in public places, individuals retain certain privacy interests. *Cf. Katz v. United States*, 389 U.S. 347, 351 (1967). Where, as here, Uplinger did not engage in any harassing, annoying or bothersome activity, but merely conveyed his personal desires in a discreet and inoffensive manner, and in a wholly private conversation, he cannot be said to have relinquished his right to privacy in sexual matters simply because his conversation took place in a public place. As the New York Court of Appeals in *Onofre* recognized:

At the outset it should be noted that the right [of privacy] addressed in the present context is not, as a literal reading of the phrase might suggest, the right to maintain secrecy with respect to one's affairs or personal behavior; rather, it is a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint—what we referred to in *People v. Rice* [citation omitted] as "freedom of conduct" [citation omitted]. *People v. Onofre*, 51 N.Y.2d 476, 485, 437 N.Y.S.2d 947, 949.

The right to privacy in sexual matters, including the freedom to make sexual choices, would be unduly burdened if persons are denied the access to exercise the right discreetly

hibit consensual sodomy, the Federal Constitution permits recourse to the sanctions of the criminal law for the achievement of that objective. The community and its members are entirely free to employ theological teaching, moral suasion, parental advice, psychological and psychiatric counseling and other non-coercive means to condemn the practice of consensual sodomy. The narrow question before us is whether the Federal Constitution permits the use of the criminal law for that purpose. 51 N.Y.2d 476, 488, n. 3, 434 N.Y.S.2d 947, 951, n. 3.

and inoffensively. *See Carey v. Population Services International*, 431 U.S. 678, 685-87.

Because there are no compelling interests to justify the invasion of privacy rights by Penal Law § 240.35(3), *see* pp. 9-11, above, the statute, as applied to persons who, like Uplinger, seek to engage in consensual sodomy, should be held unconstitutional.

POINT III

New York Penal Law § 240.35(3) is not facially invalid, and need not be struck in its entirety.

The New York Court of Appeals unnecessarily struck down Penal Law § 240.35(3) in its entirety, *People v. Uplinger*, 58 N.Y.2d 936, 460 N.Y.S.2d 514.* Penal Law § 240.35(3) is constitutional insofar as it prohibits loitering for the purpose of engaging, or soliciting another to engage, in deviate sexual conduct *other than* consensual sodomy.** Thus, prosecutions for loitering for the purpose of soliciting minors to engage in deviate sexual intercourse or other sexual behavior of a deviate nature are not unconstitutional applications of the statute. Unlike consensual sodomy, the underlying conduct—sexual activity with a minor—may be constitutionally prohibited. *See New York v. Ferber*, — U.S. —, 102 S.Ct. 3348, 3354 (1982) (a

* "A state court is not free to avoid a proper facial attack on federal constitutional grounds. [citation omitted]. By the same token, it should not be compelled to entertain an overbreadth attack when not required to do so by the Constitution." *New York v. Ferber*, — U.S. —, 102 S. Ct. 3348, 3360 (1982).

** Penal Law § 240.35(3) prohibits loitering or remaining "in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature." (emphasis added).

“state’s interest in ‘safeguarding the physical and psychological well being of a minor’ is ‘compelling’. [citation omitted].”).

Because Penal Law § 240.35(3) may, in certain instances, be applied in accordance with constitutional dictates, it should not have been found unconstitutional in its entirety, but simply in its application to those who loiter for the purpose of engaging, or soliciting another person to engage, in consensual “deviate sexual intercourse”, as that term is defined in Penal Law § 130.00(2).

Conclusion

The order of the Court of Appeals should be vacated and the cases remanded to the New York Court of Appeals with a direction that the application of Penal Law § 240.35(3) be prohibited only with respect to persons who loiter for the purpose of engaging, or soliciting another person to engage, in consensual “deviate sexual intercourse”, as that term is defined in Penal Law § 130.00(2).

Respectfully submitted,

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DEC 27 1983

No. 82-1724 STEVAS,
CLOCK

In The
Supreme Court of the United States
OCTOBER TERM, 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER and SUSAN BUTLER,

Respondents.

**ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS**

**PETITIONER'S OBJECTION TO MOTION OF
THE COMMITTEES ON SEX AND LAW, CIVIL
RIGHTS, CRIMINAL LAW, AND CRIMINAL
COURTS OF THE ASSOCIATION OF
THE BAR OF THE CITY OF NEW YORK
TO FILE BRIEF *AMICUS CURIAE***

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In The
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RIGHTS, CRIMINAL LAW, AND CRIMINAL
COURTS OF THE ASSOCIATION OF
THE BAR OF THE CITY OF NEW YORK
TO FILE BRIEF *AMICUS CURIAE***

Petitioner State of New York hereby respectfully files its objection, pursuant to Supreme Court Rule 36.3, to the motion made by the Committees on Sex and Law, Civil Rights, Criminal Law, and Criminal Courts of the Association of the Bar of the City of New York to file a brief *amicus curiae* on behalf of Respondent Uplinger. The motion and brief *amicus curiae* were received by petitioner on December 20, 1983. Consent to file a brief as *amicus curiae* had been requested of petitioner but refused on the ground that *amicus* had no concrete, substantial interest in the decision of the case.

Petitioner respectfully requests that the Court deny the motion for leave to file the brief *amicus curiae* because the

various committees of the Association of the Bar of the City of New York have raised and discussed in their proffered brief no issue which has not already been dealt with by a party to this controversy, Respondent Uplinger. Specifically, in arguing that Penal Law §240.35(3) is facially unconstitutional in that it abridges rights protected by the First and Fourteenth Amendments without a concomitant compelling state interest, the *amicus curiae* brief covers no new relevant material or presents no novel relevant argument which has not been submitted by Respondent Uplinger. Petitioner respectfully submits that the proposed brief will not in any way further assist the Court in that it is merely duplicative of information already filed by a party to the case.

For all the foregoing reasons, petitioner respectfully requests this Court to deny the motion of the Committees on Sex and Law, Civil Rights, Criminal Law, and Criminal Courts of the Association of the Bar of the City of New York for leave to file a brief *amicus curiae*.

Respectfully submitted,

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DEC 27 1983

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Respondents.

**ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS**

**PETITIONER'S OBJECTION TO MOTION OF
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC. TO FILE BRIEF AMICUS CURIAE**

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**ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS**

**PETITIONER'S OBJECTION TO MOTION OF
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC. TO FILE BRIEF *AMICUS CURIAE***

Petitioner State of New York hereby respectfully files its objection, pursuant to Supreme Court Rule 36.3, to the motion made by the Lambda Legal Defense and Education Fund, Inc. for leave to file a brief *amicus curiae* on behalf of respondent Uplinger. The motion and brief *amicus curiae* were received by petitioner on December 21, 1983. Consent to file a brief as *amicus curiae* had been requested of petitioner but refused on the ground that *amicus* had no concrete, substantial interest in the decision of the case.

Petitioner respectfully requests that the Court deny the motion for leave to file the brief *amicus curiae* because the Lambda Legal Defense and Education Fund, Inc. has no legitimate interest in the instant case as demonstrated by the content of its proposed brief *amicus curiae*. Two-thirds of the

brief concentrates on homosexuality *per se*, and the contention of *amicus* that private, non-commercial consensual sodomy is protected by the fundamental constitutional right of privacy. Thus, to this extent, the proffered *amicus curiae* brief ignores totally the legal issue before the Court, to wit, the constitutionality of New York Penal Law §240.35(3). The only matter for review is the New York statute that criminalizes certain conduct, wholly unrelated to the sexual preference of the solicitor. Those portions of the instant *amicus curiae* brief which concentrate on homosexuality in contemporary American life will not assist the Court in any way and therefore should not become a part of the materials to be considered in this case.

With respect to the discussion of the claimed under-inclusiveness of New York Penal Law §240.35(3), this issue and all of the other relevant claimed constitutional infirmities of the statute have already been very well briefed, with examples and authorities, by respondent Uplinger. Thus, the brief of *amicus* will not assist the Court in any way in that it presents no relevant arguments or materials on the singular question to be decided, to wit, the constitutionality of the statute.

For all the foregoing reasons, petitioner respectfully requests this Court to deny the motion of the Lambda Legal Defense and Education Fund, Inc. for leave to file a brief *amicus curiae*.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

PETITIONER'S OBJECTION TO MOTION OF
NATIONAL ASSOCIATION OF BUSINESS COUN-
CILS *ET AL.* TO FILE BRIEF *AMICI CURIAE*

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**PETITIONER'S OBJECTION TO MOTION OF
NATIONAL ASSOCIATION OF BUSINESS COUN-
CILS *ET AL.* TO FILE BRIEF *AMICI CURIAE***

Petitioner State of New York hereby respectfully files its objection, pursuant to Supreme Court Rule 36.3, to the motion made by the National Association of Business Councils, the Federation of Parents and Friends of Lesbians and Gays, Lesbian and Gay Interfaith Alliance, National Gay Rights Advocates, Lawyers for Human Rights, Midge Costanza, Evelyn Hooker, Ph.D., Wardell B. Pomeroy, Ph.D., Joseph LoPiccolo, Ph.D., Bruce Voeller, Ph.D., Alvin F. Poussaint, M.D., Margaret Lawrence, M.D., Sol Gordon, David McWhirter, M.D., and Michael Carrera, Ph.D. for leave to file a brief *amici curiae*. The motion and brief *amici curiae* were received by petitioner on December 20, 1983. Consent to file a brief as *amici curiae* had been requested of petitioner but refused on the ground that *amici* had no concrete, substantial interest in the decision of the case.

Petitioner respectfully requests that the Court deny the motion for leave to file the brief *amici curiae* because the above-named organizations and individuals have no legitimate interest in the instant case as demonstrated by the content of their proposed brief *amici curiae*. The interests which they advance are right to travel interstate, promotion of the family, and separation of the church and state. In support of these interests, they urge that a review of the issue decided in *People v. Onofre*, 51 NY2d 476, 434 NYS2d 947, 415 NE2d 936 (1980), *cert. denied*, 451 US 987 (1981), would be inappropriate.

Clearly, the entire premise of the instant *amici curiae* brief is that certiorari was improvidently granted by this Court which should not review at this time the legality of private, non-commercial consensual sodomy. Since the issue before this Court, as set forth in petitioner's brief, concerns the constitutionality of New York Penal Law §240.35(3) and not the correctness of the New York Court of Appeals ruling in *Onofre, supra*, the *amici curiae* brief proffered by the above-listed organizations and individuals is wholly irrelevant and uninformative. Indeed, the instant *amici curiae* brief will not assist the Court in any way and thus should not become a part of the materials to be considered in this case.

For all the foregoing reasons, petitioner respectfully requests this Court to deny the motion of the National Association of Business Councils *et al.* for leave to file a brief *amici curiae*.

Respectfully submitted,

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DEC 27 1983

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**ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS**

**PETITIONER'S OBJECTION TO MOTION OF
AMERICAN PSYCHOLOGICAL ASSOCIATION,
AMERICAN PSYCHIATRIC ASSOCIATION AND
AMERICAN PUBLIC HEALTH ASSOCIATION TO
FILE BRIEF AMICI CURIAE**

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**ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS**

**PETITIONER'S OBJECTION TO MOTION OF
AMERICAN PSYCHOLOGICAL ASSOCIATION,
AMERICAN PSYCHIATRIC ASSOCIATION AND
AMERICAN PUBLIC HEALTH ASSOCIATION TO
FILE BRIEF *AMICI CURIAE***

Petitioner State of New York hereby respectfully files its objection, pursuant to Supreme Court Rule 36.3, to the motion made by the American Psychological Association, American Psychiatric Association, and American Public Health Association for leave to file a brief *amici curiae*. The motion and brief *amici curiae* were received by petitioner on December 19, 1983. Consent to file a brief as *amici curiae* had been requested of petitioner but refused on the ground that *amici* had no concrete, substantial interest in the decision of the case.

Petitioner respectfully requests that the Court deny the motion for leave to file the brief *amici curiae* because the American Psychological Association, the American Psychiatric Association, and the American Public Health Association have no legitimate interest in the instant case as demonstrated by the content of their proposed brief *amici curiae*. This brief con-

centrates almost exclusively on whether the State may outlaw homosexuality *per se*, with abundant scientific and medical authorities supporting the "naturalness" of deviate sexual behavior. No authorities or data are provided regarding the receptiveness of the general public to indiscriminate street solicitations. Thus, the brief *amici curiae* ignores totally the legal issue before the Court.

Clearly, the criminalization *vel non* of "private, consensual variant sexual practices" is not the question before this Court as framed in petitioner's brief. The matter for review is a New York statute that criminalizes certain conduct, wholly unrelated to the sexual preference of the solicitor. *Amici's* misunderstanding of the case even extends to a misquoting of the statute, referring to "deviant" instead of the statutory language "deviate".

The issue of the claimed constitutional infirmities of the statute has been very well briefed, with examples and authorities, by respondents Uplinger and Butler. The brief of *amici* will not assist the Court in any way in that it presents no relevant arguments or materials on the singular question to be decided, to wit, the constitutionality of New York Penal Law §240.35(3).

For all the foregoing reasons, petitioner respectfully requests this Court to deny the motion of the American Psychological Association, American Psychiatric Association, and American Public Health Association for leave to file a brief *amici curiae*.

Respectfully submitted,

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**ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS**

**PETITIONER'S OBJECTION TO MOTION OF
CENTER FOR CONSTITUTIONAL RIGHTS AND
NATIONAL LAWYERS GUILD TO FILE BRIEF
*AMICUS CURIAE***

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**PETITIONER'S OBJECTION TO MOTION OF
CENTER FOR CONSTITUTIONAL RIGHTS AND
NATIONAL LAWYERS GUILD TO FILE BRIEF
*AMICUS CURIAE***

Petitioner State of New York hereby respectfully files its objection, pursuant to Supreme Court Rule 36.3, to the motion made by the Center for Constitutional Rights and National Lawyers Guild for leave to file a brief *amicus curiae*. The motion and brief *amicus curiae* were received by petitioner on December 20, 1983. Consent to file a brief as *amicus curiae* had been requested of petitioner but refused on the ground that *amicus* had no concrete, substantial interest in the decision of the case.

Petitioner respectfully requests that the Court deny the motion for leave to file the brief *amicus curiae* because the Center for Constitutional Rights and National Lawyers Guild have no legitimate interest in the instant case as demonstrated

by the content of their proffered brief *amicus curiae*. This brief concentrates to a large extent on whether the State may outlaw homosexuality *per se*, as well as lengthy, historical discussions of various types of discrimination irrelevant to the instant case.

From a reading of petitioner's brief, it is clear that the right of individuals to engage in private, non-commercial consensual sodomy is not the issue before this Court. Nor is this Court called upon to decide in this case whether homosexuals are the object of discrimination based upon their sexual preference. Rather, the Court has before it for review a New York statute that criminalizes certain conduct, wholly unrelated to the sexual preference of the solicitor.

Moreover, the instant motion for leave to file a brief *amicus curiae* should be denied on the ground that in their brief the Center for Constitutional Rights and National Lawyers Guild have presented an adversarial, argumentative statement of the facts which is unjustified by the record in this case. On this ground alone, denial is warranted. Moreover, the proffered brief concentrates on the City Court decision to the complete exclusion of the decision of the state's highest court.

Finally, the issue of the claimed constitutional infirmities of the statute (e.g., violation of the First Amendment for overbreadth, vagueness, and underinclusiveness) has been well briefed by respondents Uplinger and Butler. Thus, the brief of *amicus curiae* will not assist the Court in any way in that it presents no relevant arguments or materials on the sole question to be decided, to wit, the constitutionality of New York Penal Law §240.35(3).

For all the foregoing reasons, petitioner respectfully requests this Court to deny the motion of the Center for Constitutional Rights and National Lawyers Guild for leave to file a brief *amicus curiae*.

Respectfully submitted,

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DEC 27 1983

No. 82-1724

ALEXANDER L. STEVAS,
CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER and SUSAN BUTLER,

Respondents.

**ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS**

**PETITIONER'S OBJECTION TO MOTION OF
THE AMERICAN ASSOCIATION FOR PERSONAL
PRIVACY, THE SEX INFORMATION AND
EDUCATION COUNCIL OF THE UNITED STATES
(SIECUS), THE COALITION ON SEXUALITY
AND DISABILITY, AND THE SOCIETY FOR
THE SCIENTIFIC STUDY OF SEX TO FILE
BRIEF AMICI CURIAE**

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In The
Supreme Court of the United States
OCTOBER TERM, 1983

No. 82-1724

STATE OF NEW YORK,

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**ON WRIT OF CERTIORARI TO THE
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**PETITIONER'S OBJECTION TO MOTION OF
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AND DISABILITY, AND THE SOCIETY FOR
THE SCIENTIFIC STUDY OF SEX TO FILE
BRIEF *AMICI CURIAE***

Petitioner State of New York hereby respectfully files its objection, pursuant to Supreme Court Rule 36.3, to the motion made by the American Association for Personal Privacy, the Sex Information and Education Council of the United States (SIECUS), the Coalition on Sexuality and Disability, and the Society for the Scientific Study of Sex for leave to file a brief *amici curiae*. The motion and brief *amici curiae* were received by petitioner on December 20, 1983. Consent to file a brief as *amici curiae* had been requested of petitioner but refused on the

ground that *amici* had no concrete, substantial interest in the decision of the case.

Petitioner respectfully requests that the Court deny the motion for leave to file the brief *amici curiae* because the American Association for Personal Privacy, the Sex Information and Education Council of the United States (SIECUS), the Coalition on Sexuality and Disability, and the Society for the Scientific Study of Sex have no legitimate interest in the instant case as demonstrated by the content of their proposed brief *amici curiae*. This brief concentrates almost exclusively on whether the State may outlaw homosexuality *per se*, with abundant scientific and medical authorities in support thereof.

Clearly, "the justifiability of the ruling of the New York Court of Appeals in *People v. Onofre*, 51 NY2d 476 (1980), *cert. denied*, 451 US 987 (1981), that decisions by adults to engage in private consensual sexual activity are protected by the constitutional right to privacy" (Brief of *Amici Curiae* at 2) is not the issue before this Court as framed in petitioner's brief. Petitioner is not asking this Court to review the correctness of the Court of Appeals decision in *Onofre*, *supra*, decriminalizing private, non-commercial consensual sodomy. However, as a review of the proffered *amici curiae* brief demonstrates, the entire argument of *amici curiae* centers upon the consensual sodomy issue rather than what this Court has, in fact, been called upon to decide, to wit, the constitutionality of New York Penal Law §240.35(3).

For all the foregoing reasons, petitioner respectfully requests this Court to deny the motion of the American Association for Personal Privacy, the Sex Information and Education Council of the United States (SIECUS), the Coalition on Sexuality and Disability, and the Society for the Scientific Study of Sex for leave to file a brief *amici curiae*.

Respectfully submitted,

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Supreme Court, U.S.
FILED

DEC 27 1983

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STATE OF NEW YORK,

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ROBERT UPLINGER and SUSAN BUTLER,

Respondents.

ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

PETITIONER'S OBJECTION TO MOTION OF
AMERICAN CIVIL LIBERTIES UNION AND
THE NEW YORK CIVIL LIBERTIES UNION
TO FILE BRIEF *AMICI CURIAE*

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In The
Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1724

STATE OF NEW YORK,

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ROBERT UPLINGER and SUSAN BUTLER,

Respondents.

**ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS**

**PETITIONER'S OBJECTION TO MOTION OF
AMERICAN CIVIL LIBERTIES UNION AND
THE NEW YORK CIVIL LIBERTIES UNION
TO FILE BRIEF *AMICI CURIAE***

Petitioner State of New York hereby respectfully files its objection, pursuant to Supreme Court Rule 36.3, to the motion made by the American Civil Liberties Union and the New York Civil Liberties Union for leave to file a brief *amici curiae*. The motion and brief *amici curiae* were received by petitioner on December 20, 1983. Consent to file a brief as *amici curiae* had been requested of petitioner but refused on the ground that *amici* had no concrete, substantial interest in the decision of the case.

Petitioner respectfully requests that the Court deny the motion for leave to file the brief *amici curiae* because the proffered brief of the American Civil Liberties Union and the New York Civil Liberties Union will not assist the Court in that it will not present any relevant arguments or materials which

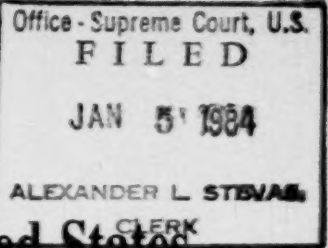
would not otherwise be submitted. The arguments advanced by *amici* for the striking of New York Penal Law §240.35(3) include vagueness, First Amendment violations, and unconstitutional application to the facts of the case.

A comparison of the instant *amici curiae* brief with the briefs filed by respondents Uplinger and Butler demonstrates that these issues have been very well briefed, including abundant examples and authorities, by the parties in the case. *Amici* American Civil Liberties Union and New York Civil Liberties Union have no stake in the decision of the case when compared to the parties. Accordingly, since the issues, authorities, and arguments discussed by *amici* are wholly duplicative of those already before this Court in the briefs of respondents, no justification exists to grant the instant motion.

For all the foregoing reasons, petitioner respectfully requests this Court to deny the motion of the American Civil Liberties Union and the New York Civil Liberties Union for leave to file a brief *amici curiae*.

Respectfully submitted,

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No. 82-1724

IN THE

Supreme Court of the United States

October Term, 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER,

Respondent.

On Writ of Certiorari to the
New York State Court of Appeals.

Response of Amici National Association of Business
Councils, et al. to Petitioner's Objection to Motion
of Said Amici to File Brief Amici Curiae.

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No. 82-1724
IN THE
Supreme Court of the United States

October Term, 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER,

Respondent.

**Response of Amici National Association of Business
Councils, et al. to Petitioner's Objection to Motion
of Said Amici to File Brief Amici Curiae.**

Amici herein hereby respectfully file their response to Petitioner's objection to the motion made by the said *amici* --- the National Association of Business Councils, the Federation of Parents and Friends of Lesbians and Gays, Lesbian and Gay Interfaith Alliance, National Gay Rights Advocates, Lawyers for Human Rights, Midge Costanza, Evelyn Hooker, Ph.D., Wardell B. Pomeroy, Ph.D., Joseph LoPiccolo, Ph.D., Bruce Voeller, Ph.D., Alvin F. Pous-saint, M.D., Margaret Lawrence, M.D., Sol Gordon, David McWhirter, M.D., and Michael Carrera, Ph.D. — for leave to file a brief *amicus curiae*.

The response of *amici* to the said objection is threefold. First, the interest of the *amici* goes beyond that stated by the said objection. Clearly, the interest is appropriate and

the brief proffered is relevant and informative if this Court chooses to review the issues decided in *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), cert. denied, 451 U.S. 987 (1981), which this Court might do. Just as clearly, *amici* are interested not only in the legality of private, non-commercial consensual sodomy, but also in the legality of the loitering statute of this case, because the *Onofre* interests mentioned above and in the said brief *amicus curiae* are greatly affected by a statute which nips *Onofre* rights in the bud.

Second, if Petitioner is correct in his assertion that the present case does not involve *Onofre* issues, then there are no constitutional issues before this Court, because the New York Court of Appeals specified none. The said brief *amicus curiae* shows that the Court of Appeals decision rested on statutory construction, not the federal Constitution. If the Court sustains the objection of the Petitioner because it has chosen not to review the constitutional issues of *Onofre*, then this Court could dismiss the writ of certiorari as improvidently granted even before oral argument, since all that is left in the case is an issue of statutory construction which is beyond the jurisdiction of this Court, as shown in the said brief *amicus curiae*.

Finally, while there may be great redundancy among some of the other briefs filed in the case, this brief discusses concisely an important issue discussed by no other.

For all the foregoing reasons, *amici* herein respectfully request this Court to overrule Petitioner's objection and to grant the motion of the said *amici* for leave to file their brief *amicus curiae*.

Respectfully submitted,

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DAVID GOODWIN,
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Center for Education and
Legal Advocacy,
Attorneys for Amici.

JAN 4 1984

ALEXANDER L. STEVAS.

CLERK

No. 82-1724

IN THE

Supreme Court of the United States

October Term, 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER and SUSAN BUTLER,

Respondents.

ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS.

RESPONSE OF RESPONDENT ROBERT UPLINGER TO STATE'S OBJECTIONS TO FILING OF *AMICUS CURIAE* BRIEFS

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GLOSSARY.

The following terms of art and abbreviations are used in this Brief.

Cert. Pet. = Petition for Certiorari, filed April 22, 1983.

State's Brief = Brief for Petitioner filed with this Court November 17, 1983.

Uplinger Brief = Brief of Respondent Robert Uplinger, dated December 8, 1983.

Attorney General's (or A.G.) Brief = Brief *Amicus Curiae* of the Attorney General of the State of New York (Robert Abrams), filed December, 1983.

AAPP Brief = Brief of the American Association for Personal Privacy. The Sex Information and Education Council of the United States (SIECUS), The Coalition on Sexuality and Disability, and the Society for the Scientific Study of Sex, submitted for filing December, 1983.

ACLU Brief = Brief of the American Civil Liberties Union and the New York Civil Liberties Union, *Amici Curiae*, dated December 16, 1983.

APA Brief = Brief of *Amici Curiae* American Psychological Association, American Psychiatric Association and American Public Health Association in Support of Respondents, dated December 17, 1983.

iv.

Bar Brief = Brief of the Committees on Sex and Law, Civil Rights, Criminal Law, and Criminal Courts of the Association of the Bar of the City of New York on Behalf of Respondent Uplinger, submitted for filing December, 1983.

CCR Brief = Brief *Amicus Curiae* of Center for Constitutional Rights and National Lawyers Guild in Support of Respondents, dated December 17, 1983.

Lambda Brief = Brief of Lambda Legal Defense and Education Fund, Inc. on Behalf of Respondent Uplinger, dated December 17, 1983.

NABC Brief = *Amicus Curiae* Brief of the National Association of Business Councils [and several other organizations and individuals], submitted for filing December, 1983.

IN THE
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October Term, 1983

No. 82-1724

STATE OF NEW YORK,

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ROBERT UPLINGER and SUSAN BUTLER,

Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK
STATE COURT OF APPEALS.

**RESPONSE OF RESPONDENT ROBERT UPLINGER
TO STATE'S OBJECTIONS TO FILING OF
AMICUS CURIAE BRIEFS**

Petitioner is objecting to the filing of all *amicus* briefs (other than that of the New York Attorney General). The principal objections are, first, that a particular brief is directed at the question of the power of the state to "outlaw homosexuality" [referring to the right of privacy issue decided by *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936 (1980), *cert. den.* 451 U.S. 987

(1981)], which issue is not presented by petitioner for decision herein; second, that issues addressed have been "well briefed" by one or both respondents already; third, that the particular *amicus curiae* does not have a "substantial interest" or "stake" in the outcome of the case sufficient to justify filing of its brief; and, fourth, that the brief will not "assist" this Court.

With particular reference to the CCR Brief,¹ the State claims that the *amicus* distorts the record in an "adversarial, argumentative statement of the facts" and improperly "concentrates on the City Court decision". Comparison of the CCR Brief, 1-9, with the record will illustrate the accuracy of the factual statement, based, as it is, on factual observations rather than on hearsay and conclusory police assumptions. Furthermore, neither the County Court decision nor the dissent in the Court of Appeals rejected the factual findings and conclusions in the trial court; reference to those findings and conclusions in the CCR Brief is appropriate to the arguments there made.

Respondent Uplinger is confident that his Brief herein and the applicable constitutional provisions fully support affirmance of the judgment below. In some instances, respondent Uplinger does not agree with arguments or conclusions proffered by the *amicus* briefs. Nonetheless, it is believed that the *amicus* briefs offered herein will provide this Court with additional perspectives and a pool of information, useful in the Court's consideration of the case.

¹ See Glossary, *supra*.

Moreover, the State has consented to submission of *amicus* briefs in the court below, while seeking to deny the benefit thereof to this Court.²

Beyond the foregoing general comments, respondent makes the following observations.

A. Arguments and materials in the *amicus* briefs regarding the right of privacy are relevant for this Court's consideration in the present proceeding.

Respondent Uplinger has argued that this Court should probably not review *Onofre, supra*, under *Illinois v. Gates*, _____ U.S. _____ (1983), 76 L.Ed.2d 527 [Uplinger Brief, 9-11]; if the *Onofre* issue is "necessarily implicated" (*id.* at 11), respondent argues that the legal conclusions reached in *Onofre* should be upheld. *Id.*, 39-44.

The Attorney General's Brief argues that the decision below was grounded on the constitutional right of privacy (A.G. Brief, 12) and further urges that Penal Law §240.35-3 unduly burdens the exercise of the "right to privacy in sexual matters" (*id.* 15-16). Compare Bar Brief, 5-6, fn. 2 ("unclear from the opinion below whether the court's holding is based on privacy considerations"). Other *amici* urge this Court not to reach the *Onofre* issues (*e.g.* ACLU Brief, 3; APA Brief, 5-8) or ask for dismissal of the writ as improvidently granted (NABC Brief, 5 *et seq.*, *esp.* 16). While asserting it is not

² The Erie County District Attorney interposed no objection to the filing of *amicus* briefs with the New York Court of Appeals in this case. Separate *amicus* briefs were filed in that Court by Lambda Legal Defense and Education Fund, Inc., Center for Constitutional Rights and New York Civil Liberties Union, three of the *amici* who have tendered briefs to this Court. See *People v. Uplinger*, 58 N.Y.2d 936 (1983).

necessary to reach *Onofre*, the CCR Brief argues that Uplinger's speech here was itself protected by the right to privacy. CCR Brief, 54-58.

Petitioner claims it has not presented the *Onofre* question in its Brief and that the issue is therefore not before this Court. This is not a civil case wherein the parties can stipulate an issue out of the case. Significantly, the State does not concede *Onofre*'s correctness; it simply does "not deal with" that question. State's Brief, 2. Cf. Cert. Pet., 6, fn. 1 (*People v. Onofre* "an unfounded decision").

This Court will wish to consider whether the privacy right is "necessarily implicated" in the decision below and, if it is, what disposition should be made of that issue. On both questions, the various *amicus* briefs will be helpful.

B. The *amicus* briefs do not unduly repeat arguments made by the parties and will assist this Court.

While the independent filing of eight, separate *amicus* briefs will necessarily involve some repetition of arguments made by the parties on an issue of significant public and constitutional importance, the additional briefs present different aspects of the problem from those argued by the parties. To the extent of duplication, additional authorities are found. Any clear duplication will be easily recognized and passed over by the Court when the matter is under review for decision.

There are significant differences in the approach by various *amici* from that taken by respondents, however. For example:

1. The argument for a right of privacy attaching to Uplinger's conversation as a part of the right to sexual privacy [A.G. Brief, 12-16; CCR Brief, 54-58;

Bar Brief, 15-18; Lambda Brief, 10-25, *esp.* 14-15] goes beyond the more limited privacy argument made by Uplinger. Uplinger Brief, 39-44, *esp.* 41-42 (privacy right limited to the "front door").

2. Uplinger argues that the loitering law is aimed at homosexuals. Uplinger Brief, 15, 34. Implicit is the question whether such a discriminatory classification is constitutionally permissible. Information regarding homosexuality and variant sex practices in present-day America (*e.g.* AAPP Brief, *passim*; APA Brief, 8-21) is directly useful to this Court in considering this question.

3. Uplinger's argument of underinclusiveness (Uplinger Brief, 34-35) is substantially expanded upon in the CCR Brief (41-48) and the Lambda Brief (30-32).

4. The NABC Brief alone presents considerations which may be of interest on the question of possible dismissal of the writ as improvidently granted, particularly in light of petitioner's unexpected decision not to present the *Onofre* question, made after this Court granted certiorari on a petition which requested review of that question.

5. The ACLU Brief presents other state cases which have struck down solicitation statutes where the object was not unlawful. ACLU Brief, 23.

C. The *amici* have an appropriate "interest" to support their briefs.

Petitioner argues that the various *amici* have no "concrete, substantial interest" and, in some cases, "no legitimate interest" to justify allowance of the briefs. The State betrays a misunderstanding of the function of an *amicus curiae*. It is not a party; its interest in the outcome is designed not to be specific like a party's concern but, rather, of a general nature related to a cause, idea or public concern.

The various *amici* before the Court are either involved in civil liberties issues (ACLU Brief), scientific, sociological, medical and emotional health concerns relating to sex (APA and AAPP Briefs), study and advocacy of particular legal interests (AAPP, CCR and Bar Briefs) or particularized activities for the improvement and protection of the rights of homosexuals, the group most directly affected by the statute (Lambda and NABC Briefs).

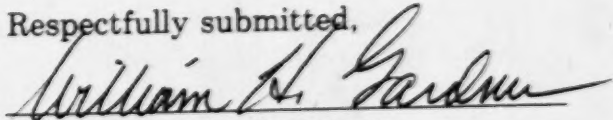
While permission for filing *amicus* briefs over a party's opposition rests with the discretion of this Court, that discretion should not be exercised on any premise that the various *amici* lack sufficient interest or standing to file briefs in that status.

Conclusion

Respondent Uplinger respectfully recommends that the Court grant the motions of the various *amici* herein.

Dated: January 2, 1984

Respectfully submitted,



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No. 82-1724-CSY
Status: GRANTED

Title: New York, Petitioner
v.
Robert Uplinger and Susan Butler

Docketed:
April 22, 1983

Court: Court of Appeals of New York

Counsel for petitioner: Arcara, Richard J.

Counsel for respondent: Mistrett, Joseph B., Gardner, William H.

Entry	Date	Note	Proceedings and Orders
1	Apr 22 1983	G	Petition for writ of certiorari filed.
2	May 17 1983		Brief of respondent Robert Uplinger in opposition filed.
3	May 18 1983		waiver of right of respondent Susan Butler to respond filed.
4	May 25 1983		DISTRIIBUTED. June 9, 1983
5	Jun 8 1983	F	Response requested.
6	Jul 5 1983		Brief of respondent Susan Butler in opposition filed.
7	Jul 6 1983		DISTRIIBUTED. September 26, 1983
8	Oct 3 1983		Petition GRANTED. *****
9	Nov 17 1983		Brief of petitioner New York filed.
10	Nov 17 1983		Joint appendix filed.
11	Dec 2 1983	D	Motion of respondent Butler for divided argument filed.
12	Dec 5 1983		SET FOR ARGUMENT. Wednesday, January 18, 1984. (4th case).
13	Dec 12 1983		Motion of respondent Butler for divided argument DENIED. Justice Marshall would grant this motion.
14	Dec 12 1983		Record filed.
15	Dec 12 1983		CIRCULATED.
16	Dec 16 1983	X	Brief of respondent Susan Butler filed.
17	Dec 16 1983	X	Brief of respondent Robert Uplinger filed.
18	Dec 17 1983	G	Motion of American Psychological Association, et al. for leave to file a brief as amici curiae filed.
19	Dec 17 1983	G	Motion of Center for Constitutional Rights, et al. for leave to file a brief as amici curiae filed.
20	Dec 17 1983	G	Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae filed.
21	Dec 16 1983	G	Motion of Committees on Sex and Law, etc. of the Association of the Bar of the City of New York for leave to file a brief as amicus curiae filed.
22	Dec 16 1983	G	Motion of American Association for Personal Privacy, et al. for leave to file a brief as amici curiae filed.
23	Dec 17 1983		Brief amicus curiae of Attorney General of New York filed.
24	Dec 17 1983	G	Motion of Lambda Legal Defense & Education Fund, Inc. for leave to file a brief as amicus curiae filed.
25	Dec 16 1983	G	Motion of National Association of Business Councils, et al. for leave to file a brief as amici curiae filed.
26	Dec 27 1983		Opposition of petitioner to motion of American Psychological Association, et al. for leave to file a brief as amici curiae filed.
27	Dec 27 1983		Opposition of petitioner to motion of Center for

Entry	Date	Note	Proceedings and Orders
			Constitutional Rights, et al. for leave to file a brief as amici curiae filed.
28	Dec 27 1983	Opposition of petitioner to motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae filed.	
29	Dec 27 1983	Opposition of petitioner to motion of Committees on Sex and Law, etc. of the Association of filed.	
30	Dec 27 1983	Opposition of petitioner to motion of American Association for Personal Privacy, et al. for leave to file a brief as amici curiae filed.	
31	Dec 27 1983	Opposition of petitioner to motion of Lambda Legal Defense & Education Fund, Inc. for leave to file a brief as amicus curiae filed.	
32	Dec 27 1983	Opposition of petitioner to motion of National Association of Business Councils, et al. for leave to file a brief as amici curiae filed.	
33	Jan 4 1984	X Reply brief of respondent Uplinger to State's opposition to a/c motions filed.	
34	Jan 5 1984	Response of amici Natl. Assn. of Bus. Councils, et al. to petitioner's objection to motion to file a/c filed.	
35	Jan 9 1984	Motion of American Psychological Association, et al. for leave to file a brief as amici curiae GRANTED.	
36	Jan 9 1984	Motion of Center for Constitutional Rights, et al. for leave to file a brief as amici curiae GRANTED.	
37	Jan 9 1984	Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae GRANTED.	
38	Jan 9 1984	Motion of Committees on Sex and Law, etc. of the Association of GRANTED.	
39	Jan 9 1984	Motion of American Association for Personal Privacy, et al. for leave to file a brief as amici curiae GRANTED.	
40	Jan 9 1984	Motion of Lambda Legal Defense & Education Fund, Inc. for leave to file a brief as amicus curiae GRANTED.	
41	Jan 9 1984	Motion of National Association of Business Councils, et al. for leave to file a brief as amici curiae GRANTED.	
42	Jan 11 1984	X Reply brief of petitioner New York filed.	
43	Jan 18 1984	ARGUED.	